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HAVE JURIES A RIGHT TO DECIDE THE LAW, IN CRIMINAL CASES?

The discussion of this interesting question has been recently renewed in Massachusetts; and, while we write, a bill is pending before our legislature, declaring that, in criminal cases, the jury may rightfully decide law as well as fact. The immediate cause of this movement, is the passage of the Fugitive Slave Law; and the bill, introduced by Mr. Sewall, is intended as an answer to the able decision, pronounced by Judge Curtis, in the case of *The United States* v. *Robert Morris*. It is said not only that this doctrine ought to be law, but that it actually is the common law. On the other hand, we think that it ought not to be, and that it is not, and never was the law.

It is generally agreed that, in civil cases, the jury are bound to receive the law from the court. The reasons for this are obvious. The judges are fitted by long study and careful training to perform judicial duties; they are selected from the whole community, with a view to their fitness for these duties; and it is absurd to suppose that the most abstruse of sciences can be as well understood by unlearned men, not skilful in the law, and only chosen by lot. Again, it is of the first importance that law should be fixed and certain; that it should not vary in different vicinities, or change from day to day. It has been said, with some truth, that it is more important to have the law fixed, than to have it good. But this object can only be attained by leaving it to be decided by the court. And we should act almost as wisely in settling our cases by lot, as in submitting the law to the chances of the jury-box. Correctness

and permanency are both secured by having a responsible tribunal, subject to the revision of a higher court, whose decisions are published to the world; and both are perilled by subjecting those decisions to the views of an irresponsible and secret tribunal, whose deliberations are summed up in a general verdict, or perhaps, expressed in a single word.

All this, we say, is admitted in civil cases; but, since life, and liberty, and reputation are higher interests than those of property, it is still more important that the law in criminal cases should be decided by the court. We should not be satisfied to hold our lands by no higher tenure than a jury's opinions on a point of real law. Why then, in a case involving life, itself, shall we leave to them the questions, what the law is, and whether it is constitutional, and whether it is just? The safety of citizens, as well as the interests of society, requires that juries should receive the law from those, whose business it is to know the law.

But it is said, that the jury have the *power* to determine the law, and if the State gives them the power, it gives them the right also. "Power and right are convertible terms when an act is authorized, which is final, and for which the agent is not responsible." This was the argument used by Hamilton in the case of *People* v. *Croswell*, (3 Johns. Cas. 337–345,) and it has often been repeated. No doubt, juries have the power to disregard the obligation of their oath; and so have witnesses. The witness is liable to punishment; the juryman, from the necessity of the case, is not; but this fact does not free him from the obligation of his oath, or alter the intent of law. In civil cases, as well as in criminal, juries have the power to disregard the ruling of the court; they may set aside the statute of limitations, or the statute of frauds; and in many cases, great wrongs have been perpetrated in this way. So, in all cases, they have the power to disregard the evidence. But no lawyer ever argues, that here the power implied the right, or that a juryman, who exercised that power, was guiltless of perjury. Magistrates, in the trial of criminal cases, have the power to receive inadmissible testimony; to reject evidence rightly offered by the accused; to adjudge an innocent man guilty. They may do this wilfully and with impunity, but they cannot do it rightfully. These are only a few instances among thousands, which show that power and right are not "convertible terms."

Again, it is said that there is a danger in criminal cases, which does not arise in civil, that judges will lean to the side of government, and we are pointed to the decisions in the days of the Stuarts, for examples of this evil. We may remark, also, that in civil as well as in criminal cases, the corrupt judges of those days gave unjust decisions in favor of the government and its supporters; so that this argument proves too much. But there are better answers to this point. The tenure of the judicial office is changed; in Massachusetts as in England, it is for good behavior; in other States, it is by election for a fixed term; but nowhere do judges hold their seats only at the pleasure of the administration. In this way, we have endeavored to secure a right, mentioned in the constitution of this State: "The right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

But the truth is, that in all free countries, and in our own country most of all, the chief danger to the citizen arises, not from the leaning of our judiciary toward the government, but from popular prejudice, from political excitement, from the prevailing madness of each passing hour. In ordinary cases, criminals are in little danger of injustice, either from court or jury. In the present state of feeling, both seem too often to be leagued together as accessaries after the fact, in a common determination to screen offenders from punishment. But when any fierce excitement rules the minds of men, then we need the administration of law from our courts to save the unpopular from wrong. The tyranny, which innocent men have to fear, is not that of the president, or of his cabinet, or of any executive officer. Their danger arises from the despotism of public opinion, which may rule the jury-box; but which cannot alter the law as laid down by sound and independent judges. It is the highest office of courts to protect the rights of minorities; and this is best accomplished by applying to each case the law as it is, — THE LAW, which knows nothing of majorities or minorities, which feels no prejudice, and is controlled by no party. In the recent trials of the Christiana rioters, a jury, incensed against the violation of law, would gladly have doomed the accused to death, had not the judge protected them by deciding that their offence did not amount to the crime of treason.

It is said, however, that judges may set aside improper

verdicts of guilty, so that juries will only have the power *to acquit* unjustly. But this will not always prevent unrighteous convictions. The judge may take a different view of facts from that taken by the jury, so that he may be satisfied with their condemnation of the prisoner. And yet, if they had regarded the law, as laid down by the court, they would, with their view of the facts, have given a verdict of acquittal, or at least, have failed to agree. The court, in a case of homicide, may think that the evidence shows such malice as constitutes the crime of murder. The jury may look at the facts quite differently; but they may choose to disregard the advice of the court on the nice legal points, and thus find a man worthy of death, who under the law of the land, and with their verdict on the fact, would be allowed to live. The least evil, in such cases, would be, that a man innocent in view of the law, would be subjected to the stigma of a condemnation, and saved by the interposition of the court.

The most frequent evil would undoubtedly be the escape of criminals, and we are "old-fashioned" enough to consider this as an evil. We should not like to see well matured statutes, or venerable decisions set aside, according to the whims of twelve unlearned men; nor should we recognize the justice of a practice, which would make "The Liquor Law" constitutional in Norfolk, and unconstitutional in Suffolk, and leave it to lot whether it should stand or fall in Middlesex.

In our view, it would not beget a respect for law, to see the jury on one side of the court room convicting a liquor-dealer; while the second jury, not believing the law to be constitutional, acting on the same evidence, acquitted his agent, who had personally committed the offence, for which his employer was punished. It is said that in rare cases this evil may happen now. But because we cannot prevent the infrequent occurrence of a wrong, shall we legalize, and encourage it, and make it common?

In answer to what we have said about the unfitness of juries to decide the law, we are told, that every man is presumed to know the criminal law, so that he may be punished for a violation of its precepts. But certainly, it is a miserable quibble to argue that the knowledge, which teaches a man that it is wrong to kill his neighbor, implies an accurate acquaintance with the nice technicalities, that distinguish murder from manslaughter. The law does in-

deed, by an artificial presumption, hold that every man is informed of its command. This is done from the necessity of the case, since otherwise all criminals would escape; but this does not alter the fact, that the generality of men are wholly unacquainted with the law. The same reasoning would lead us to select judges from men unlearned in legal studies, since all are equally acquainted with law, and to forbid the argument of legal points before courts, since it is a waste of time to explain that, with which all men are fully and equally acquainted.

Much of the feeling on this subject arises from the fallacy, contained in the phrase, "rights of juries." But the main object of government is, not to secure the rights of juries, but the rights of citizens; and among the most valuable of these, is the right of being tried by a tribunal, that is not only honest, but able and learned in the law.

In reviewing briefly the cases upon this point, we cannot do better than to give an abstract of Judge Curtis's opinion, delivered in *United States* v. *Morris*. In this case, the defendant's counsel stated that the jury were rightfully judges of the law, and that if any of them believed the "Fugitive Slave Act" to be unconstitutional, they ought to decide accordingly, without regard to the rulings of the court. The judge prevented him from laying these points before the jury, and after listening to argument, pronounced this decision.

First, the constitution in article VI, provides that this instrument, with the laws and treaties made by the United States, shall be the supreme law of the land. But this could not be, if every jury were final judges of the law in each case submitted to them. This article further provides, that the *judges* shall be bound by the supreme law, — a needless provision, if they had no power in deciding it. Again, it is the intention of the constitution that all persons shall be bound by an oath to support it, if they are to make, or expound the laws; but no such oath is required of juries.

No case in any English court, prior to the revolution, conflicts with this view of the duties of jurors. The opinion of Chief Justice Vaughn, in *Bushwell's case*, (3 State Tr. 99.) only decides that jurors cannot be punished for a verdict of acquittal because the general issue embraces law and fact, and it cannot be proved that the jury believed

the evidence. In the famous libel cases, no decision was quoted, which sustained the right of juries to decide the law in criminal cases; and that right was denied in *Rex* v. *Dean of St. Asaph*, (3 T. R. 428.) The Libel Bill of Mr. Fox admits that juries are not to decide the law, but "denies that libellous intent is matter of law, and asserts that it is so mixed with fact, that under the general issue, it is for the jury to find it as a fact." The general rule as laid down by Lord Mansfield, that juries are not judges of law in criminal cases, is still the law of England. *Parmiter* v. *Copeland*, (6 M. & W. 105); *Levi* v. *Milne*, (4 Bing. 195.)

The sedition law, (St. 1798, c. 74, s. 3,) providing that juries shall have the right to determine the law and the fact under the direction of the court as in other cases, does not show, that juries may decide the law in other cases, but it shows the opposite; for this provision would not have been needed, if juries had the right to determine all questions; and this section would not provide that they should be directed by the court, if they had the right to disregard such directions. And such was the ruling by the Supreme Court of Ohio, on a similar clause in their Bill of Rights, in *Montgomery* v. *State*, (11 Ohio, 427.)

The act of Congress, passed April 29, 1802, provides for the certifying of questions to the Supreme Court, in cases of disagreement between the judges, and for their final decision by that court. It cannot be intended, that a jury have the right to reverse the decision of the Supreme Court; nor will it be claimed that juries are bound by the decisions of the Supreme, but not by those of inferior courts.

The first case in the United States courts cited in favor of the right of juries to decide questions of law, is *State of Georgia* v. *Brailsford*, (3 Dallas, 4.) This was a trial by jury of issues out of chancery. It can hardly be correctly reported, for Chief Justice Jay is stated to have said that the facts were all agreed, and that the only question was one of law; while, in truth, the court were agreed as the law. It was a civil case; and it is not claimed that the doctrine extends to civil cases; and finally the charge is inconsistent, stating, that it is the province of the court to decide the law; and in the next sentence, declaring that it is the right of the jury.

In the *United States* v. *Willson*, (Bald. 78,) the jury were

told that they had a right to judge of the law; but in *United States* v. *Shine*, (Bald. 510,) the same judge gave directly the opposite instructions. The first article of impeachment in Judge Chase's case asserts this alleged right, but this has not the weight of a decision, and it was not conceded by the judge's counsel. (See Chase's Trial, p. 182.) In *United States* v. *Battiste*, (2 Sumner, 240,) a capital case, Judge Story decided against the right claimed for juries. This decision has been published for many years, and Congress has not seen fit to change the rule.

The weight of decisions in State courts is in the same scale. In *People* v. *Croswell*, (3 Johns. Cas. 337,) the court were divided; but the question was as to the jury's right to decide the intent in a trial for libel, which is not the question now under discussion. The Supreme Court of New York, in *People* v. *Price*, (2 Barb. S. C. R. 566,) a capital case, held that the jury were bound to take the law from the court. So in Indiana, *Townsend* v. *State*, (2 Blackf. 152); in New Hampshire, *Pierce* v. *State*, (13 N. H. 536); and in Massachusetts, *Commonwealth* v. *Porter* (10 Met. 263.)

The power to go contrary to law no more supposes the right, than the similar power to go contrary to evidence. Nor does the form of oath indicate that jurors are at liberty to decide the law. They swear to decide facts according to their evidence, but if they may decide the law, they act without the obligation of an oath. A passage from Littleton's Tenures, (Lib. 3, s. 368,) and the stat. Westminster 2, c. 30, with Coke's Commentary, (2 Inst. 425,) were referred to as sustaining the right claimed for jurors. These authorities relate to an assize, which was not a jury, nor a criminal case. The statute provided a penalty for the assize, if they decided the law wrongly, and this shows that they had not a right to decide law, although they had the power.

Juries are, indeed, sole judges of the application of the law to a particular case; but if they intentionally fail to apply the law as laid down by the court, it is a violation of duty as much as if they should knowingly return a verdict contrary to the evidence.

We will now refer briefly to the decisions upon this subject in the State courts.

The case of *Commonwealth* v. *Porter* arose on the License Laws of Massachusetts, and it decided two points;

first, that it is the duty of the jury to receive the law from the court, and to conform their judgment and decisions to the instructions so received; second, that the defendant or his counsel has a right to address the jury upon such questions of law as come within the issue, because, in rendering a general verdict, the jury must pass upon the whole issue, and thus incidentally may pass upon questions of law.

From reading the able argument of the defendant's counsel in this case, it appears that the reasons in favor of the right of juries are drawn chiefly from three sources; first, from decisions in favor of the right of counsel to address juries on legal questions; second, from loose *dicta* and general expressions of judges, whose attention was not called to the point now in dispute; third, from the decisions in libel cases. The first class of authorities is well explained in the opinion of Chief Justice Shaw, to which we have just referred, and is there shown to be entirely consistent with the right of the court to decide the law. But even this right has been denied to counsel by the Supreme Court of Virginia, in *Davenport* v. *Commonwealth*, (1 Leigh, 588,) and in *Commonwealth* v. *Garth*, (3 Leigh, 761); and also in Rhode Island, at the famous trial of Dorr for treason, (Dorr's Trial, 77–82.)

The *dicta* of judges are not, of course, legal decisions; but these *dicta* generally amount to no more than this, that juries do practically decide the law, because they have the power to give a general verdict of not guilty, and this verdict cannot be set aside. Such are the remarks of Judge Putnam, in *Commonwealth* v. *Knapp*, (10 Pick. 496,) and of Chief Justice Shaw, in *Commonwealth* v. *Kneeland*, (20 Pick. 222); and these are fair specimens of the citations made in defence of the doctrine, against which we are contending. This view of such expressions is taken in *Montee* v. *Commonwealth*, (3 J. J. Marsh. 150,) which is an able decision adverse to the right claimed for juries.

The American decisions in libel cases, like the Act of Mr. Fox, only establish the rule, that in libel suits, the defendant's intention is a question of fact for the jury, and not of law for the court. The opposite doctrine only left to jurors the fact of publication, so that, as Lord Erskine remarked in arguing for the Dean of St. Asaph, every publisher, indicted, must be convicted, however innocent his work might have been. This is the view of the law

taken in England, as appears from the remarks of Justice Parke in *Parmiter* v. *Copeland*, (6 M. & W. 107.) "In criminal cases, the judge is to define the crime, and the jury are to find whether the party has committed the offence. *Mr. Fox's act made it the same in cases of libel, the practice having before been otherwise.*" In the case of *Levi* v. *Milne*, a civil action for libel, C. J. Best says: "I mean to protest against juries, even in criminal cases, becoming judges of the law; the act only says, they may find a general verdict." This famous act, viewed correctly, becomes a strong authority in support of our position; for it shows that, even in libel cases, the jury are not properly judges of law; and expressly enacts, that the judges are to direct them, "*as in other cases.*"

In addition to the cases cited above, we may quote the following American decisions. *Pennsylvania* v. *Bell*, (Addison, 160); *Kelton* v. *Bevins*, (Cooke, 107); *Hardy* v. *State*, (7 Missouri, 607); and *Commonwealth* v. *Abbott*, (13 Met. 120.)

We think it clear, that these decisions ought to convince any unprejudiced man, that the weight of authority, and the weight of reason, coincide in establishing the principle that in criminal, as in civil cases, it is the province of the court to decide all legal questions. And the object of referring those questions to them, may be well expressed in the familiar language of the constitution of Massachusetts, "That this may be a government of laws, and not of men."

Recent American Decisions.

Circuit Court of the United States, District of Massachusetts. — Decided March, 1852.

ALBERT WEBB *et al.*, Libellant, v. DAVID PEIRCE, Jr., Respondent.

Where a master hires a vessel "on shares," under an agreement to victual and man the vessel, and employ her in such voyages as he thinks best, having thereby the entire possession, command, and navigation of the vessel, and the relation of principal and agent not existing between the master and owners, the master thereby becomes the owner *pro hac vice*, during such time as the contract exists; and he, and not the general owner, is responsible for necessary supplies.

The case of *Skolfield et al.* v. *Potter et al.*, (Daveis, R. 392,) considered.

The case of *Webb et al.* v. *Peirce et al.*, (14 Law Rep. 200,) overruled.

THIS was an appeal from a decree of the District Court of the United States for the District of Massachusetts, sitting in admiralty. The libellants sought to recover of the respondent, who was the general owner of the brig Antoinette, belonging to Belfast, in the State of Maine, the price of certain supplies furnished by them to the master of that brig in the city of Boston. The facts sufficiently appear in the opinion of the court, which was delivered by

CURTIS, J. — It is proved in this case, and not denied, that the libellants furnished the supplies mentioned in the schedule annexed to the libel; that they were ordered by the master of the brig, and were suitable and necessary; and that at the time when the supplies were furnished, the respondent was one of the general owners of the vessel. This is sufficient to make a *primâ facie* case of liability; for ordinarily the master is the agent of the owner, clothed with authority to contract in his behalf for necessary supplies for the vessel, and therefore such contracts bind the owner personally, upon the familiar principles of the law of agency. But it is also true, that the master may not be the agent of the general owner for any purpose. A special property, carrying with it the entire possession and control, and leaving in the general owner only an interest in the nature of a reversion, may be created in a vessel as well as in any other chattel. And when such a special property has been created, it necessarily follows, that the master is the agent of the owner of this special property in the vessel, and not the agent of the owner of the general or reversionary interest. The possession and control belonging to the former, and the employment being his, whatever is done by reason of that possession, and in the exercise of that control and employment, is his also, and the persons by whom it is done are his agents.

I am aware that a different doctrine is laid down by Lord Mansfield in *Rich* v. *Coe*, (Cowper, 636,) and that Mr. Justice Story, in his treatise on Agency (§ 298), has declared, in conformity with Lord Mansfield's opinion, that a private agreement between the owner and the master, by which the latter is to have the entire ship to his own use for a specified period, and is to make all the repairs at his own expense, cannot affect the liability of the owner to third persons, upon the well settled principle of the law of agency, that the apparent authority of an agent may be trusted to by strangers. If the private agreement between

the owner and master be of such a nature as to leave the relation of principal and agent still existing between them, it is undoubtedly true, that the owner would be bound by all contracts respecting the navigation and employment of the vessel, within the usual scope of the master's authority, notwithstanding a secret agreement between them, that the master should not thus bind the owner. But if the arrangement between the master and owner be such that the relation of principal and agent does not exist, it is very clear there is no room for the application of this principle of the law of agency, simply because there is no agency in the matter.

Now, that this relation of principal and agent between the general owner and the master may cease to exist, and that either the master or any third person may be clothed with a special ownership, so as to stand as a principal in respect to the navigation and employment of the vessel, is too well settled to admit of serious question. It is distinctly asserted by the Supreme Court of the United States, in *Marcardier* v. *Ches. Ins. Co.* (8 Cranch, 39,) and in *Gracie* v. *Palmer*, (8 Wheat. 605,) and has been so held in numerous cases in England and in this country, which are collected in 3 Kent's Com. 138, 139, and the doctrine of Lord Mansfield must be considered to be overruled by the Court of King's Bench in *Reeve* v. *Davis*, (1 Adol. & El. 312.) In this case, there was an agreement between the owner and the master, by which the latter was to have the vessel to his own use for the period of twelve months, to victual and man the vessel, and keep her in repair. This agreement was unknown to the plaintiff, who furnished supplies for the vessel, and sought to recover their price of the general owner, who was held not to be liable therefor. *Perry* v. *Osborne*, (5 Pick. 422); *Cutler* v. *Winsor*, (6 Pick. 335); *Winsor* v. *Cutts*, (7 Greenl. 261); *Sproat* v. *Donnell*, (26 Maine, R. 185); and *Taggard* v. *Loring*, (16 Mass. 337); are all cases of similar contracts between the master and owner, which were held to substitute the former in place of the latter, as owner, and that the relation of principal and agent did not exist between them.

Concerning this last case, Mr. Justice Story, in *Arthur et al.* v. *The Schr. Cassius*, (2 Story, 93,) expresses some doubt, and he held that a master, who had agreed with the owner to employ and navigate, victual and man a vessel, retaining as his compensation as master and for his own

services, one half the freight which should be earned, could, by a charter party, give a lien on the vessel to the shipper of merchandise. But he points out a difference between the contract of hiring in *Taggard* v. *Loring*, and in the case before him, and the question decided did not depend upon the rule of law now under consideration. It may well be that a master having for the time being the control and navigation of the vessel, may enter into charter parties containing the usual clause binding the ship to the merchandise, and the merchandise to the ship, and that full effect would be allowed to such a clause by a court of admiralty, upon the ground that the power thus to bind the vessel to shippers, resulted from the master's possession, and the purposes for which he held it, wholly independent of the consideration, whether he was acting as agent or principal, or whether one person was entire owner and the master his agent, or another person owner *pro hac vice* and the master the agent of the latter. And I cannot suppose that this very eminent judge intended to cast the least doubt upon a rule of law so well settled, and which he himself had so often recognised, which enables the general owner to create a special ownership; which is thus interposed between him and all third persons as to whom the special owner is the principal, and responsible as such. I understand the doubt expressed by him to have arisen in his mind, not concerning this rule of law, but as to quite a different question, viz., whether the contract in *Taggard* v. *Loring* was sufficient in point of law to create the master owner *pro hac vice*. Upon this question I think the rule is at this day perfectly well settled.

When the possession, command, and navigation of the ship are let by the general owner, the hirer becomes owner *pro hac vice;* the possession is his; the employment is his; the contracts respecting that employment are his; the master, if he employs one, is his agent; if he commands the vessel himself, he acts on his own account. In the language of Chancellor Kent, (3 Com. 138,) "This may be considered the sound and settled law on this subject."

So that in a case like this, where the question is whether the general owner is liable for supplies, furnished to the master, we must inquire whether the general owner had parted with the possession, command and navigation of the vessel, and thus interposed another owner, to whom the credit must be deemed to have been given. This requires

an investigation of the facts of the particular case, and it is correctly argued by the libellant's counsel, that the decisions relied on by the respondent's counsel, that when a vessel has been taken on shares, the general owner is not liable for supplies, do not necessarily apply to this case, because its facts may be different from those. Accordingly, much evidence has been introduced by both parties, relative to this contract of hiring, and its nature and incidents, a large part of which was not exhibited to the District Court.

The testimony of the master, which is not controlled, proves that he made a verbal agreement with the owners to sail the vessel on shares. He was to victual and man the vessel, and pay one half the port charges, and he and the owners were to divide the gross earnings equally. He was to go wherever he chose with the vessel, and employ her in such ways as he might think fit during an indefinite period of time. On cross examination, he says his contract was founded on, by which I understand him to mean in conformity with, a well settled usage at Belfast, to let small vessels on shares; that he had no right to appoint another master in his place, and that he has no doubt the owners could at any time remove him, and that he might give up the vessel without any notice; that there was no agreement to that effect, but he so understands the usage. I have examined the letters of the master which were put into the case, but I find in them nothing inconsistent with his testimony.

Such being the contract, it is quite clear that while it subsisted, the master had, in point of fact, the entire possession, command and navigation of the vessel. It would be difficult to state a case of more absolute possession, command and navigation, than that he should take the vessel, command her, victual and man her, go with her where he pleased, and employ her in such trade as he saw fit. But still there are certain elements in the contract which require examination. The contract was for no definite period of time; and it is urged that by reason of this and by force of the usage of the trade, the owners might displace the master at any time, and so he had not the possession and command as owner, or any different possession and command from those of an ordinary master, sailing the vessel solely on the owners' account. That after a master has made such a contract as this, and has

hired a crew and purchased supplies for a particular voyage, and actually entered upon and partly completed it, the owners should have the right to turn him out of possession without notice, and thus break up an enterprise lawfully begun, and in the completion of which he has an important interest, and which is to be completed by his crew and his supplies, is so much in conflict with the nature of the contract, and the just rights of the parties flowing from it, that plenary evidence would be required to convince me of the existence of such a right. There is no reason to suppose that it was created in this case by any express stipulation. And the admission of the master that it existed, is rested by him solely on his understanding of the usage of trade applicable to such cases.

I do not deem it necessary to decide whether such a usage would be void on account of its unreasonableness, because I am not satisfied of its existence. The evidence is conflicting, and so much of it as tends to prove such a usage, may be referred to the opinions of the owners of vessels who have testified to it, rather than to any settled practice, sufficiently general and long continued to create such a right. Indeed no one case of removal of the master during a voyage, by force of the usage, has been clearly proved; and many persons from Belfast and other ports, long acquainted with this trade, have been examined, who appear to be ignorant of such a practice. My conclusion is, that in point of fact there is no such usage, and that it results from the nature of this contract when it is for an indefinite period, that it amounts to an absolute and indefeasible hiring of the vessel, for every voyage which shall be begun before notice by the general owner of his intention to discontinue the contract. And this brings the case within that class of cases which have turned on such contracts of hiring, and in which it has been held the master was owner *pro hac vice*, and not an agent of the general owner. *Cutler* v. *Winsor*, (6 Pick. 335); *Perry* v. *Osborne*, (5 Pick. 422); *Thompson* v. *Hamilton*, (12 Pick. 428); *Manter et al.* v. *Holmes et al.*, (10 Met. 402); *Thompson* v. *Snow*, (4 Greenl. 264); *Sproat* v. *Donnell*, (26 Maine R. 185.)

The evidence respecting the usage of trade is also conflicting as to the right of the owner to control the master in his choice of a voyage, and the power of the master to appoint another master in the home port.

I do not deem it necessary to find what the usage is upon the first of these points, because the uncontradicted evidence of the master proves an agreement with the owners that he should employ the vessel as he saw fit, and while this contract existed the owners had no power to control him in this particular. It does not seem to me to be shown that by the usage, the master to whom the vessel is let, may appoint another in his place in the home port. There is a personal confidence reposed in him by the owners, who rely on his skill to manage the employment as well as the navigation of the vessel, and the instances of such changes spoken of by some of the witnesses, appear to have been infrequent, and were probably sanctioned by the owners as expedient and proper, rather than acquiesced in as matter of right on the part of the hirer. But, however this may have been, it does not seem to me inconsistent with the entire possession, command and navigation of a vessel, that the hirer is restrained from appointing a person other than himself master, any more than it is inconsistent with the entire possession and temporary ownership of a house, that the lessee cannot underlet or assign his lease. It is a usual incident of ownership of a vessel, whether general or special, that the owner should have power to choose and appoint the master; but I know of no rule of law, and can see nothing in the nature of the case which requires it to be an inseparable incident of such ownership, and therefore the fact that the hirer must himself, personally, command the vessel, does not prove that he is not owner *pro hac vice*. It has been suggested, *Dey* v. *Boswell*, (1 Camp. 329); *Skolfield et al.* v. *Potter et al.*, (Daveis, R. 392,) that the moiety of the gross freight the master retains, under such a contract, to his own use, may be considered to be in lieu of his wages as master, and so that it is duly a contract of hiring of the master by the owners. But this is not consistent with the facts. The master not only commands the vessel, and manages her trade and employment, but victuals and mans her, and the moiety of the gross freight is not retained by him simply as a compensation for his services. It is more in accordance with the contract to consider the moiety of the gross freight paid to the owners as their charter money for the use of the vessel. This is the view taken of the contract in the cases already referred to, and it is satisfactory to my mind. The truth undoubtedly is, as stated by

Abbott, C. J., in 1 Ryan & Moody, 42, that soon after the passage of the registry acts, the leaning of the English courts was to hold the registered owners liable for repairs and supplies. *Rich* v. *Coe* was one of those decisions. But the subject having become more accurately understood, a better principle was introduced, and more recent cases decide that the true question is, to whom was the credit given. If no intervening ownership has been created, the credit is deemed to be given to the general owner. But if the vessel is let out to hire, the owner is no longer a contracting party for supplies, and so not liable. Such is the modern doctrine on this subject, and is now too well settled to be departed from, and I may add that it seems to me to rest on sound principles.

My opinion is, that, when a master hires a vessel "on shares," under an agreement to victual and man the vessel, and employ her in such voyages as he thinks best, he thereby becomes the owner *pro hac vice*, during such time as the contract exists, and that he, and not the general owner, is responsible for necessary supplies. There is a circumstance in this case, not necessary, in my judgment, to its decision, but which tends strongly to strengthen the equity of the defence. It is that Webb, one of the libellants, who sold these supplies to the master, was for several years a resident of Belfast, and engaged in such business at that place that he must have been acquainted with the custom, nearly universal there, to let vessels, of the class of this brig, to the masters, on shares, and that he therefore had ample means of knowing that this vessel was so let, and that the master, and not the owners, was to victual and man the brig.

To prevent misapprehension, I desire to state that I have examined the able opinion of Judge Ware in *Skolfield et al.* v. *Potter et al.*, (Daveis, R. 392,) in which he charged the general owners of a vessel let on shares, with the wages of a seaman. There are elements in that case upon which the decision may rest consistently with the principles upon which this case has been decided, and I do not intend to express any opinion as to a claim for wages on a general owner who has received freight earned in the voyage, for which wages are claimed.

The result is, that the decree of the District Court is to be reversed, and the libel dismissed with costs.

Supreme Judicial Court, Suffolk County, November Term, 1851.

JAMES STEARNS *v.* ADIN HALL.

Parol evidence is admissible to prove a subsequent oral agreement enlarging the time of performance of a simple contract, or varying its terms, or to show a waiver or discharge, although the original contract was required by the statute of frauds to be in writing.

THIS was an action of assumpsit on the following agreement.

"Mr. J. S. — Sir, I will sell you the house No. 42 Myrtle street on the first day of October next, if you will pay what it has cost me, with my charges for the same. Boston, May 20, 1843. ADIN HALL."

The plaintiff had owned the house in Myrtle street, but being committed to jail for debt, he conveyed an absolute estate therein to defendant, with the understanding that it should be reconveyed. Afterwards, defendant gave plaintiff the above writing. At the trial, plaintiff produced that writing, his deed to defendant, and certain letters from defendant. He also called witnesses, showing the circumstances of the transaction, and that Hall gave further time to Stearns to repurchase his house, and that Stearns offered to do so, within the time. The defendant objected to the reception of this evidence and of the letters, and contended that such evidence was not allowed by the statute of frauds. The court held the contrary; and the case was reported to the full court. The opinion of the court was delivered by

FLETCHER, J. — As a general rule, oral evidence is admissible in proof of a subsequent oral agreement to enlarge the time of performance of a simple contract in writing, or to vary any other terms of the contract, or even to show an entire waiver or discharge. This rule is established by numerous authorities. Whether it is applicable to any, and what extent to written contracts, within the statute of frauds, has been frequently and largely discussed, and the cases, both English and American, are numerous and conflicting. This conflict of authorities has occasioned much difficulty. In *Cummings* v. *Arnold*, (3 Met. 486,) this subject was fully considered, and the cases examined by this court, who regarded the language of the statute of frauds as requiring the memorandum of the bargain to be in writing, that it might be made certain, but not as under-

taking to regulate the performance. And after fully considering the cases, they decided that the principle laid down in some, that the matter of performance was left to be decided by the rules of law in relation to the admission of parol evidence to vary the terms of other contracts, was most satisfactory.

The case most relied on was *Cuff* v. *Penn*, (1 M. & S. 21,) a case precisely resembling this; and this strongly illustrates the propriety and necessity of the rule. The plaintiff, it is to be presumed, would have performed his share of the contract within the time, but for the defendant's agreement to extend it. It is a sound principle, that he who prevents a thing being done shall not avail himself of the non-performance which he has occasioned. Suppose a party should go with the money in his hands to fulfil the contract at the stipulated time, and be put off for some reason, would not justice require that he should be at liberty to show this, to entitle himself to the benefits of the contract? And no more injury can result from the admission of parol evidence for this purpose, to show an extension of the time allowed for performance, than to prove performance itself at the time. Defendant defaulted, and an assessor to be appointed.[1]

E. M. Bigelow, for plaintiff.

C. A. Welch, for defendant.

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[1] No principle is more familiar than the general rule, that oral testimony is inadmissible to contradict or vary a written contract. *St. Louis Perpetual Ins. Co.* v. *Homer*, (9 Met. 39.) It is equally clear, that a written agreement does not preclude the making of a new contract by parol, between the parties, and that the written contract may subsequently be waived or varied by parol. *Munroe* v. *Perkins*, (9 Pick. 298); *Lattimore* v. *Hassen*, (14 John. 330); *Dearborn* v. *Cross*, (7 Cow. 48); *Le Fevre* v. *Le Fevre*, (4 S. & R. 241); *Goss* v. *Ld. Nugent*, (5 Barn. & Ad. 58, 65.)

The difficulty arises in cases where the original contract falls within the operation of the statute of frauds, and on this point the decisions are certainly conflicting.

The case of *Thresh* v. *Rake*, (1 Esp. 53,) sustains in part the doctrine laid down in *Stearns* v *Hall*. The defendant had agreed to assign certain premises, at an appraisement to be made on August 13th; but which was not made, from defendant's default, and by consent of the parties, until August 14th. Lord Kenyon held, that proof of the alteration of the contract was admissible, and, also, that a declaration on the original contract was sufficient, as this was a continuance of the same contract. The contract in this case was within the statute, but the point does not appear to have been raised

A similar decision was made at *Nisi Prius*, by Buller, J., in *Warren* v. *Stagg*, on a contract to deliver goods at a certain time, and an extension of the time by parol. This case is cited in the argument of *Littler* v. *Holland*,

(3 T. R. 590,) which was decided on the ground that proof of an extension did not support the declaration.

The next case is that of *Cuff* v. *Penn*, (1 M. & S. 21.) The defendant had agreed by a written contract to buy 300 hogs of bacon of plaintiffs, to be delivered at fixed times in specified quantities. After partial delivery, plaintiffs were requested not to press the delivery, and this request was complied with. It was held, that the postponement of delivery was not a varying of the agreement by parol, but that what was done was in performance of the original contract, although there was an agreed substitution of other days than those specified for delivery. And the defendant was held liable for not receiving the residue of the bacon within a reasonable time. In pronouncing the decision, Lord Ellenborough says: "The question has been embarrassed by confounding two subjects quite distinct, namely, the provision of the statute, and the rule of law, whereby a party is precluded from giving parol evidence to vary a written contract." He adds, that the parties have chosen to take a substituted performance; but the contract remains. A delivery of live hogs instead of bacon might have been substituted and accepted.

The question was next raised, under another section of the statute, in *Goss* v *Lord Nugent*, (5 Barn. & Ad. 58.) Here, the plaintiff had contracted in writing to sell to defendant several lots of land for a fixed sum, and to make a good title thereto; and a deposit had been paid. The defendant waived the necessity of making good title to one of these lots, on learning that a good title to it could not be made. The plaintiff delivered possession of the whole to defendant, who at first received it, but afterwards refused to pay the portion of purchase-money due. The opinion of the court was given by Denman, C. J. By the rules of common law, parties before breach of a written contract, may waive, dissolve, or vary it in any manner by parol; and but for the statute of frauds, this action might have been maintained. It would seem that a written contract within the statute might be waived by parol so as to prevent either party from recovering on the original contract. But that question did not arise in this case. Any contract for the sale of land, which is sought to be enforced, must be proved by writing only. Here a new contract is set up, proved partly by a written, and partly by a parol agreement; and therefore it cannot be enforced. Lord Denman refers to the English cases cited above, and remarks that they were decided on the ground that the original contract continued, with the substitution of different days of performance; and they are not necessarily overruled by this decision

The exclusion of a parol variation was next applied in *Stowell* v *Robinson*, (3 Bing. N. R. 928,) in which the question was thus stated by Tindal, C. J., (p. 937.) "Can the day for the completion of a purchase of an interest in land be waived by a parol agreement and another day be substituted in its place, so as to bind the parties? And we are of opinion that it cannot." See, also, 5 Scott, 196. The same point was decided in *Harvey* v. *Grabham*, (5 Ad. & Ell. 73.) In this case, one portion of the contract related to an interest in land, and another portion related to the straw on the land. It was held, that although the latter part of the contract might have been made separately by parol, yet as the agreement was entire, it could not be separated, and the manner of performing this part could not be varied by parol.

The case of *Cuff* v *Penn*, is distinctly overruled in *Stead* v. *Dawber*, (10 Ad. & Ell. 57.) In this case, the plaintiff had agreed to buy, and defendant to sell a cargo, on the 20th or 22d of the month; but on the 17th the plaintiff agreed to postpone the delivery until the 24th, as the 22d came on Sunday. This was done at defendant's request. It was held, that a new contract had been substituted for the old, and that not being in writing, it could not be enforced. This case was recognised as law in *Marshall* v. *Lynn*, (6 M. & W. 109.) Here the defendant had agreed in writing to take of the plaintiff as many potatoes as the vessel of plaintiff could carry, to be shipped on her next voyage to W. At defendant's request, the contract was so varied by parol, that defendant was to receive the cargo of potatoes brought by the

vessel on her second trip. It was held, that the 4th and the 17th sections of the statute were to be construed by the same rule; that every part of such a contract must be taken to be material, so that it cannot be varied by parol, and that, consequently, the action could not be maintained.

In Massachusetts, this question has been discussed at length in *Cummings* v. *Arnold*. This was a suit for breach of a written agreement to make and deliver to the plaintiff weekly a certain quantity of cloth, at a fixed price. And the defendant was allowed to show a subsequent parol agreement with the plaintiff varying the terms of payment, which agreement the plaintiff had failed to perform. The court say, that the statute requires a written memorandum of the bargain, that it may be made certain; but it does not undertake to regulate its performance. Nor does it say that it shall not be varied by a subsequent oral agreement for a substituted performance; and this is to be decided by the rules regulating the admission of parol to vary written contracts. Accord and satisfaction by a substituted performance would have been a good defence; and the defendant's offer, with the plaintiff's refusal to comply with his request, was equivalent to accord and satisfaction. To allow a party to sue partly on a written, and partly on a verbal agreement, would be in violation of the statute; but this is not the case. The plaintiff may always sue on the written contract; and the defendant must prove performance, either according to its terms, or according to the terms of a substituted performance; and performance in either way may be proved by parol evidence. The case of *Goss* v. *Nugent* was rightfully decided, because the plaintiff declared partly on the verbal contract. In the case of *Stowell* v. *Robinson*, the distinction between the contract of sale, which must be written, and its performance, on which the statute is silent, was overlooked.

In Maine, the case of *Cummings* v. *Arnold* is recognised as law; but it was held, that the party relying upon the oral agreement, is bound to prove that it has been performed, or that he has done his part toward performing it. And a parol agreement is not sufficient of itself to excuse non-performance of the original contract. *Richardson* v. *Cooper*, (25 Maine, 450.) In an earlier case, the parol waiver of a condition in a written contract to sell land, was held good, and an action on the contract was not defeated by proving non-performance of this condition. In this case, the defendant was the seller of the land. *Blood* v. *Hardy*, (15 Maine, 61.)

The case of *Hasbrouck* v *Tappen*, (15 John 200,) has sometimes been cited as an authority against the doctrine of *Stearns* v. *Hall*. But the decision does not conflict with that doctrine. The defendant had agreed to have certain land surveyed, and to convey it free from incumbrances on January 1st The land was not surveyed on January 1st, and the vendee agreed to take no advantage of the defendant's failure to convey at that time. The land proved to be under incumbrance. And it was held, that the vendee had not waived his claim for damages for breach of the covenant against incumbrances. The ground for this decision was not that the plaintiff could not waive any part of the contract by parol, but that he had not, in fact, waived this portion of the agreement. The court say, that if the contract had required any act to be done by the plaintiff, the defendant's conduct would have dispensed with that performance, as he had prevented it. This portion of the opinion is, as far as it goes, in favor of the admission of parol to vary the contract. On the other hand, the law was thus laid down in *Blood* v. *Goodrich*, (9 Wend. 68, 79): "There are cases, when the time of performance of a written contract may be enlarged by parol; but I apprehend that this doctrine does not apply to contracts for the conveyance of land, or to any other contract, where the contract itself would not have been valid, if made by parol"

In Maryland. it has been decided, that a subsequent parol agreement, extending the time of performing a written contract within the statute, might be shown to sustain an action for enforcing the contract. *Franklin* v. *Long*, (7 G. & J. 407); *Watkins* v *Hodges*, (6 Har. & J. 38.)

It appears from the above cited cases, that the English decisions are decidedly opposed to the doctrine of *Stearns* v *Hall;* while American authority is strongly in its favor The cases cannot be reconciled; and both views of the law are sustained by weighty reasons.

Supreme Judicial Court of Massachusetts, Suffolk, ss. April 5, 1852.

IN THE MATTER OF ROBERT B. MACY, AN INSOLVENT DEBTOR.

Appeal, nature and effect of — Injunction — Insolvent Law.

Under the insolvent law of Massachusetts, a person, whose debt has been formally allowed by the commissioner, but from which allowance an appeal has been taken and prosecuted according to law, is not a creditor, entitled to vote as a creditor, after such appeal has been taken and perfected, and before any judgment of the appellate court given upon it.

THE facts in this case sufficiently appear in the opinion of the court, which was delivered by

SHAW, C. J. — This is a summary proceeding in a case of insolvency, under the powers granted to this court by the general insolvent law (Stat. 1838, cap. 163, § 18) to have jurisdiction as a court of chancery, in all cases arising under the act, upon the bill, petition, or other proper process, of any party aggrieved by any proceedings under the act. In the present case, an injunction was granted to stay proceedings, without notice, upon a representation that the exigency was urgent, to inquire into a course of proceeding alleged to be irregular and illegal; and if found so, to correct and restrain it before another meeting of the creditors of the said insolvent, which was then notified, and was to be held very soon. Generally, we have regarded such temporary injunctions, granted without notice, as provisional only, and founded in necessity, to prevent irreparable injury, and to keep matters *in statu quo*, until notice can be given and the parties be heard. The form of such injunction usually is to continue until dissolved by the court, or some one of the judges thereof, and the understanding is, that the party against whom it is granted may be heard at very short notice upon an application to dissolve it. In general, therefore, the question presents itself in nearly the same form, and is to be examined in the same mode and upon the same evidence as the original application for a temporary injunction would have been, if notice to show cause had been given, and the adverse party had attended to oppose it.

This proceeding was commenced by a petition to this court by George E. Betton, Esq., assignee of the estate and effects of Robert B. Macy, an insolvent debtor, praying for an injunction to go to Frederic H. Allen, Esq., commissioner of insolvency, William B. Mitchell and others, claiming to be creditors of the insolvent debtor, who have proved their debts. The prayer is placed upon grounds set forth in the petition, and substantially admitted or proved by the minutes of the clerk, and the files and documents in his custody. Upon the facts the case appears to be this.

A first meeting was duly called and held. Several creditors then proved their claims. The petitioner, Mr. Betton, was duly chosen assignee, by a majority in value of the creditors who had thus proved, and an assignment was made to him by the commissioner, and he entered upon the duties of his office and proceeded in the execution of them. At the regular time, and in due course, a second meeting was called and held; and at an adjournment of such second meeting, the respondents Mitchell & Co. offered proof of their debt, which was allowed by the commissioner. The assignee appealed from the decision of the commissioner allowing such debt, pursuant to sect. 4 of the general insolvent law, which appeal, the debt being a large one, was taken to this court, "to have the said claim determined at law." Notice thereof was given according to the statute, to the creditors, to the commissioner, and to the clerk, and was duly entered on the minutes. The appeal was duly entered at the proper time in this court, and is yet pending and undecided.

Subsequently an application was made to the commissioner by creditors, in which said Mitchell & Co. joined, to call a special meeting of creditors to consider and act upon a proposal to remove the assignee. This was founded on a provision in the 11th section of the act, which provides that it shall be in the power of the creditors by such a vote as is provided in the 2d section for the choice of assignees, at any regular meeting called by order of the judge for that purpose, &c., to remove all or any of the assignees, which was extended by a subsequent provision of the same section to a single assignee. Such a meeting was called, and upon taking the vote of the creditors, said Mitchell & Co., though objected to, were permitted to vote as creditors; and, including their debt, a majority in value of the creditors, voted to remove the assignee. It was left a little uncertain

at this hearing, whether the commissioner had actually passed an order pursuant to this vote, removing the assignee, when this petition was filed and the injunction notified to him, or whether he was about doing so. But this is, perhaps, immaterial.

In the above cited passage, giving power to remove an assignee, it is to be done by such a vote as is provided in the 2d section for the choice of assignees. In recurring to the 2d section, it appears that at the first meeting debts are to be proved and allowed, and the creditors shall then proceed to choose an assignee, &c., "the choice to be made by the greater part in value of the creditors, according to the debts then proved," with a proviso not material here.

The question, therefore is, whether a person whose debt has been formally allowed by the commissioner, but from which allowance an appeal has been taken and prosecuted according to law, is a creditor entitled to vote as a creditor after such appeal has been taken and perfected, and before any judgment of the appellate court given upon it.

This question is, we believe, a new one under the insolvent law, and it is not without its difficulties. Upon the first choice of an assignee, those whose debts have been allowed by the commissioner will of course vote; for until the choice or appointment of an assignee, the hearing on any claim is of necessity *ex parte*, and there can be no one, as a representative of the creditors, to object to the proof or take an appeal from the allowance by the commissioner, and the case here presented cannot exist. Practically, it is probable no great inconvenience will arise from this source. The very case of insolvency supposes the existence of actual debts more than the debtor can pay, and those presented at the first meeting probably would be the acknowledged and uncontested claims, while those of a more doubtful character intended to be resisted, would be likely to be postponed, until the creditors interested in opposing them should be represented.

What is the effect of the appeal provided for in this case? On the part of the creditor, the appellee, it is contended that the allowance of his claim by the commissioner is *primâ facie* evidence of its truth and correctness, and that it must so stand for all purposes of regulating the action of creditors before him, until reversed and annulled by the appellate court. On the other hand, it is maintained by the assignee and the opposing creditors, that an appeal, as

understood, and as the term is employed in our legislation and jurisprudence, vacates and annuls the order or decree appealed from; that such decree, when an appeal is allowed by law, and is actually taken, is regarded as a mere interlocutory order, which is wholly superseded by the appeal, and that the case stands open in the appellate court to the same course of proceeding as if it were original in that court.

With some exceptions, the court are inclined to the latter view of the question; one of these exceptions is, when a judgment or decree is founded on matter of law, apparent on the face of the record, an appeal is given by Rev. Stat. c. 82, § 6. In this case it is considered that matters of law only are open on the appeal, though even in this case the judgment of the court of Common Pleas is vacated, and a new judgment entered in the appellate court. But this modern legislation was, to some extent, a departure from the course of practice in Massachusetts, under which an appeal from a justice of the peace to the Common Pleas, and from the Common Pleas to the Supreme Court, was regarded as an entire abrogation of the judgment appealed from. So that unless some new judgment was afterwards entered, it was wholly void. Even an affirmation of the judgment below on a complaint to the appellate court was in the nature of a judgment by default.

As to the general character and effect of an appeal, both in courts of common law and of those following the course of the civil law, we would refer to 6 Dane's Ab. 442; *United States* v. *Wonson*, (1 Gall. 5); *Murdock, Appellant*, (7 Pick. 303); *Ib.* v. *Phillips' Academy*, (12 Pick. 244.)

But without discussing the question at large, respecting every species of appeal, it will be better to ascertain, if possible, what was intended by the legislature as the effect of an appeal in this case. Mr. Dane, who was thoroughly conversant with the ancient law and practice, considers this allowance of appeal, in common law cases, as a branch of our judicial proceedings, almost peculiar to this State; — that it is of civil law origin, and that it removes the cause entirely, subjecting the fact and law to a revision and a retrial.

One great object of allowing an appeal affecting a large class of cases, was to give the parties in the appellate court a trial by jury, which from the constitution of the court they could not have in the court of first instance.

Such were the probate court, and the courts of civil and criminal jurisdiction held by justices of the peace, and others sitting without a jury, but upon appeals, from which a full trial of fact and law was had in the court appealed to.

But the case under the old law, more nearly analogous to the present, was that of claims upon the estate of a deceased insolvent, examined before commissioners appointed by the judge of probate. They proceeded without a jury, had authority to take the testimony of the parties, and in other respects deviated from the course of the common law. In order to secure to both parties the benefits of a full trial of fact and law, according to the laws governing the rights of debtor and creditor, a somewhat different mode was provided, but coming to the same result. If the claim of the creditor was disallowed, he had a right to bring his action at law at the next court; otherwise, he was forever barred. If his claim was allowed, and the administrator was dissatisfied, he simply gave notice to that effect at the probate office, and the claim was stricken out of the list of claims allowed by the commissioner. Of course he was forever barred, unless he commenced an action at the next term of the court, and proceeded to get a judgment in due course of law, to be certified to the judge of probate, to be added to the list of claims allowed. From this view it is manifest that upon the dissent of either party expressed in the manner required by law, the report of the commissioners became a perfect nullity, and was no longer available for any purpose.

This course was changed in form but not in substance, by Rev. Stat. c. 68, § 8. The object seems to have been to simplify the proceedings, and avoid the trouble and expense of bringing a new original action, and secure the same end by more direct means. It provides that any person whose claim shall be disallowed, or any executor who shall be dissatisfied with the allowance of any claim, may appeal, and the claim shall thereupon be determined at common law; and it shall be tried and determined in like manner as if an action had been commenced therefor by the supposed creditor against the executor or administrator. Here it is manifest that the adjudication of the commissioners is treated as an absolute nullity.

We have already suggested that the case of claims

against a living insolvent, and the mode of prosecuting them, are more analogous to those of a deceased insolvent, than to any others. In both there will ordinarily be a large class of claims, about which there will be little or no question, which may be fitly passed upon in a summary way by a commissioner or a judge, requiring them to be verified by the affidavit of the parties only; but there may be another class, depending upon complicated questions of fact and law, which must be tried and decided under all the guaranties given by the law to debtors and creditors. The insolvent law passed in 1838, was passed soon after the Revised Statutes went into operation, and has in this respect adopted the same provisions, and to some extent borrowed the language of the Revised Statutes. We think the object was to provide for both classes of claims, the contested and the uncontested; and the law has directed a course of measures well adapted to both. For this end it provides that the claim may be passed upon in the first instance, in a summary way by the commissioner, deciding upon facts without jury, and upon affidavit only, without conformity to the rules of evidence; but it also places it in the power of either party, on complying with the required terms, to take the case out of the class of admitted, and place it in that of contested, claims, in order, as the statute declares, "to have the said claim determined at law." And it further declares that the like proceedings shall be had upon the joining of any issue of fact or law, and also upon the nonsuit or default of either party, as in any action for the same cause, commenced and prosecuted in the usual manner, except that no execution shall issue. The judgment of the court appealed to shall be final, with a right to except in matters of law; and a judgment being certified to the judge, shall ascertain the amount, if any, due to the claimant, and the list of debts shall be altered, if necessary, to conform thereto. It appears to us, that such an appeal taken under such circumstances, and upon such views of the law and the rights of the parties, does supersede and annul the order allowing a claim founded, it may be, upon slight and informal evidence, in its nature provisional and interlocutory, and not intended to stand if contested; and after such an appeal, the order must be considered as vacated to all purposes, until some judgment of the appellate court is certified to the commissioner. In case the assignee should desert his appeal and

not enter it, or having entered, should fail to prosecute it, or not succeed in making a successful defence, in all these cases, we think the appellee must obtain a new judgment of the appellate court, founded on proceedings thereon, such as on complaint, default or verdict, and have it certified to the commissioner, as the basis of his allowing the claim of the creditor, and that such judgment would not revive or give effect to the judgment appealed from.

We think the policy of the statute is this, that wherever it gives rights and qualifications to creditors, it gives it to those who have proved their debts; and such proof must be effectual proof, made in the manner provided by law, that is, before the commissioner, if he allows it, and both parties acquiesce, otherwise at the common law, before a court competent to try cases of debtor and creditors, according to established rules of law and evidence. The case of the choice of an assignee at the first meeting is hardly an exception, — 1st, because it is a matter of necessity, and — 2d, because the allowance of the commissioner must be *primâ facie* evidence, before an appeal, and there can be no appeal before the choice of an assignee. So the provision for a dividend directs it to be made among such creditors as shall have proved their debts. Sec. 12. This undoubtedly means proved definitely in the manner provided by law.

The argument from inconvenience is urged against this view, and it is said that the claim of a creditor may be appealed from, and it turns out upon a trial, that he has a valid demand, yet has had no voice, with the other creditors, in the conduct of the proceedings. But perhaps the inconvenience is as great the other way, that one having a large claim, may on his own oath, or an *ex parte* hearing, induce the commissioner to allow a claim, when it shall turn out in a legal trial, that his claim was colorable and groundless, and yet he may have chosen an assignee, and given a direction to the proceedings contrary to the interests and wishes of real creditors. Such was the case cited, where one not justly entitled to prove, had a large claim allowed, and by his own vote appointed the assignee. *Ex parte James Baker*, (8 Law Rep. 461.) We are pressed with the objection, that this construction puts it in the power of an assignee, by appealing, to prevent those creditors from acting and voting, whom he may suppose to be unfavorable to his views. It is dangerous to argue against the existence of a power, from a possibility that it may be

abused. Almost all powers given for useful purposes, may be perverted to injurious ones. If the power is not sufficiently qualified and guarded, the remedy is with the legislature.

A clause in sect. 15 was somewhat relied on, that any creditor who has proved his debt may appear, vote and act at all meetings of creditors by his attorney. This leaves the mode and fact of proof just as it stood, and simply gives power to one having a right of appearing personally, to appear by attorney.

The court are therefore of opinion, that Messrs. Mitchell & Co. have no right to vote and act as creditors; that doings of creditors, affected by the vote of Mitchell & Co.. and proceedings founded upon it, be vacated, and the case, with this order, be remitted to the commissioner, to proceed in the settlement of the estate, as if no such vote had passed, and that the injunction be dissolved.

Betton, *pro se.* *Hallett* and *Hayes*, for the respondents.

Supreme Judicial Court, Suffolk, March, 1852.

Before Mr. Justice Dewey, at Chambers.

In the matter of George Penniman, petitioner.

A person claiming to be a creditor of a supposed insolvent, with *primâ facie* evidence of indebtedness and an attachment duly made upon said demand upon the property of the insolvent, before the institution of proceedings in insolvency, is, under the insolvent act of 1838, c. 163, § 18, "a party aggrieved by proceedings under that act."

H., the supposed insolvent, an unmarried man, was a resident in Boston, in the county of Suffolk, prior to July, 1850, but in said July left his boarding-house in Boston, so far as to relinquish his room, and remove all his clothing of any value therefrom, and took lodgings with breakfast and tea in Brookline, in the county of Norfolk, at the same time continuing his business regularly in Boston, and taking his dinners at his old boarding-house in Boston. A creditor of H. petitioned the commissioner of insolvency for Suffolk county to issue his warrant against the estate of H as a bankrupt. Notice of the petition was served on H. by leaving a copy thereof at his said boarding-place in Brookline. H. not appearing on the return day, the commissioner issued his warrant, and an assignee was appointed in due time and form. *Held*, 1st, that the proceedings against H. were void, as there was no proper service of the notice of the said petition upon H. if his residence was in Boston; 2d, that if his residence was in Brookline, where the service was made, then the commissioner of insolvency for Suffolk had no jurisdiction; 3d, *held*, also, that the said proceedings were voidable by an attaching creditor.

How far the facts above stated show a change of domicil, *quære.*

This was a petition addressed to the Superior Court under the 18th section of the Insolvent Law, praying that certain proceedings in insolvency against the estate of one Hammond, might be superseded and set aside as irregular.

Upon the hearing, it appeared that Hammond had acquired and held a residence in the county of Suffolk till the month of June, 1850. He was a single man, and boarded in Boston. In June, 1850, he left his boarding-house, giving up his room, and removing all his usual articles of clothing and furniture of any value, and went to board in Brookline, in the county of Norfolk. It did not appear, that he had any definite intention of remaining longer out of the city than during the warm weather. In the fall he left the commonwealth, in debt. The petitioner commenced a suit against him, attaching certain personal property belonging to him. After this attachment, another of Hammond's creditors applied to the commissioner of insolvency for the county of Suffolk for a warrant against said Hammond's estate, upon certain grounds set forth in his petition, and the usual order was thereupon issued by the commissioner, requiring notice of such petition to be served on Hammond personally, or to be left at his last and usual place of abode. This notice was served by leaving the copy at his last boarding-place in Brookline, no other service being made. Upon the return day of this notice, said Hammond not appearing, a warrant was issued against his estate, and an assignee appointed, who took possession of the property attached by the petitioner.

Two objections were presented to the regularity of these proceedings.

1. That no authority is given by the statute to any commissioner of insolvency, to issue a warrant against a debtor's estate on petition of a creditor, unless it be in the county where said debtor "resides or last resided,"— the statute making a difference in this respect between the voluntary and the involuntary proceedings; that in this case Hammond's last place of residence was in the county of Norfolk, and that the proceedings should therefore have been commenced before the commissioner of that county.

2. That if Hammond must be deemed not to have lost his residence in Boston, so that the commissioner for Suffolk still retained jurisdiction, then there had been no sufficient service of the notice of the petition by the creditor, in compliance with the order of the commissioner, and the express language of the statute: the statute of 1844, ch. 178, § 9, requiring in such case, that the notice should be served on the debtor personally, or left at his "last and usual place of abode."

The assignee appointed under the insolvency proceedings, appeared and opposed the prayer of the present petitioner, for reasons which fully appear in the opinion of the court.

M. S. Clarke, Esq., for the petitioner.

George S. Hillard, Esq., for the assignee.

Dewey, J.—Various objections are taken to the granting the prayer of this petition, which have been fully considered, and upon which I will now state the result.

1. It is contended that the petitioner has no such interest in the proceedings in insolvency instituted against Dewitt C. Hammond, upon the petition of Joseph C. Chase, and upon which a warrant was issued by Hon J. W. Williams, a commissioner in insolvency, as will authorize him to institute a petition or bill in chancery asking the aid of this court to order a *supersedeas* of all proceedings before the commissioner. The statute of 1838, ch. 163, § 18, confers the jurisdiction under which this petition is presented. It provides, that upon the petition "of any party aggrieved by any proceedings under this act," this court may make such order as law and justice shall require.

Is the petitioner embraced within the terms, "any party aggrieved by proceedings under the act"? He claims to be an attaching creditor of the estate of the insolvent, by an attachment made prior to the institution of proceedings in insolvency. As to the fact of such attachment, there is no controversy. Some question was made as to his being in fact a creditor, and upon this point the petitioner, for the purpose of establishing that fact, produced sundry promissory notes of hand of the insolvent, apparently due, payable to the petitioner, and no evidence was offered sufficient to control this *primâ facie* case of indebtedness. It presents therefore the case of one claiming to be a creditor, and with *primâ facie* evidence of indebtedness, and the conceded fact of an attachment duly made upon said demand upon the property of the insolvent, before the institution of proceedings in insolvency. In this commonwealth, a real attachment creates a lien, and we give full effect to it as such, while it continues. The nature of this lien and law, for it was protected under the provisions of the bankrupt act, it is well known, was a point fully discussed elsewhere, but I apprehend in the Massachusetts State courts no doubt has been raised as to the nature of this lien, and that it is amply sufficient to justify such

attaching party to become a party to any proceedings instituted for the purpose of protecting this lien from dissolution.

Thus in a case of appeal claimed from the judge of probate approving and allowing a will of one deceased, it was held that an attaching creditor of the interest of one who was an heir at law, if the party had died intestate, might properly take an appeal, he being, in the language of the statute authorizing such an appeal, "a party aggrieved." *Smith* v. *Bradstreet*, (16 Pick. 265.) The case of *Stearns* v. *Kellogg*, (1 Cush. 449,) is very much in point, and we can have no doubt that the petitioner is entitled to make this appeal here as a "party aggrieved."

2. Had the commissioner for the county of Suffolk jurisdiction in the matter of this insolvent? The statute requires the proceedings to be instituted in cases of involuntary insolvency in the county "where the debtor resides, or last resided." On the face of the proceedings, this jurisdiction as to the commissioner for Suffolk would attach, as the insolvent is described in the petition praying for a warrant against his estate, as a person "whose last residence was in Boston."

But evidence has been introduced on both sides as to the fact of his last residence in the commonwealth prior to his leaving the same, at the period shortly preceding the petition to the commissioner. This evidence establishes an actual residence in Boston for several years prior to July, 1850, paying taxes there, and accompanied with all the requisite circumstances to make him a resident. In addition to this, it was the place of his business. It appears, however, that in July, 1850, he left his boarding-house in Boston, so far as to relinquish his room and remove all his clothing of any value, and took lodgings with breakfast and tea in Brookline, in the county of Norfolk, usually taking his dinners at his old boarding-house in Boston, and continuing his business regularly in Boston as heretofore.

As a question of domicil, the facts present a case of some embarrassment. Those facts which would under other circumstances be quite decisive of a change of domicil, do not necessarily have the like effect as to a mere summer residence, selected by a resident of the city. Persons may very naturally go into the country, and take lodgings for the summer months, without changing their domicil or place of residence for all purposes of business. The resi-

dence being shown to have been in Boston prior to July, is to be taken to have continued there until the change is shown by the proof, and perhaps the circumstances of the season in which the party took lodgings at Brookline, might, from analogy to other cases of temporary removal, have left the party sufficiently a resident in Boston to give jurisdiction to the commissioner in Suffolk of proceedings against him under the 19th section of statute of 1838, if a proper service had been made on the insolvent in Suffolk. But as to this we express no definite opinion, as it becomes unnecessary, as will be seen in the further consideration of the points raised in the present case.

3. The next inquiry is, whether the commissioner had authority to issue his warrant against the estate and effects of Hammond, supposing Hammond to have had his last place of residence in Boston. Jurisdiction as to the particular debtor only attaches after due notice of the petition as required by the statute of 1844, c. 178, § 9.

The manner of giving that notice is fully stated. It must be given as follows, viz. "a copy of the petition to be served personally on the debtor, or left at his last and usual place of abode." No such notice was left at his place of abode in Suffolk, but was left at his lodgings at Brookline. This was not a compliance with the statute. If he had lived in Boston, then the notice was not good, because it was left in Brookline. If the party insolvent lived in Brookline, then the whole proceedings are void, as they should have been instituted before a commissioner for Norfolk. Take the facts of residence to have been either way, therefore, the proceedings were irregular, because in any case the notice should have been left with the party at his last residence, in the same county in which the commissioner had his jurisdiction. No doubt, therefore, that Hammond might well avoid these proceedings, and upon his application we should have set them aside and ordered a *supersedeas*. The case of *Ames* v. *Winsor*, (19 Pick. 247,) is a strong case as to the place of service being that of domicil, and not that of mere commorancy. The suggestion that commorancy may be treated as the last place of residence, while one has a domicil in another place, cannot be sustained.

4. Is this ground, — the failure to serve proper notice on Hammond before issuing the warrant, &c., — open to an attaching creditor of Hammond, whose attachments will be

dissolved if the proceedings are allowed to have their usual course?

No party can bring a writ of error but the party on the record, or some joining them as representing the interest of the party. But others having an interest in the matter may avail themselves of legal objections to a judgment operating injuriously to them, as in *Downs* v. *Fuller*, (2 Met. 135); *Leonard* v. *Bryant*, (11 Met. 370.) But the case now directly to the point is that of *Stearns* v. *Kellogg*, (1 Cush. 449,) where proceedings like the present were set aside upon objections of want of proper notice to the insolvent of the taking of a deposition, which was the only evidence before the magistrate of the fact of the petitioner being a creditor, and which alone gave jurisdiction to the commissioner. But the party who had attached the estate, and whose attachment would be dissolved by the proceedings in insolvency, was allowed to interfere, and set aside the proceedings as defective and irregular.

Indeed the interests of an attaching creditor could be secured only by this mode. If this proceeding is invalid by reason of want of notice to the insolvent debtor, such debtor may come in at any stage of the proceedings, and upon his application we should be obliged to stay all the proceedings, and thus the creditor would be deprived of all opportunity of receiving even a distribution, or *pro rata* share, although he had permitted his attachment to be dissolved, and filed his claim with the assignee as an ordinary creditor.

Upon the whole matter, the court are of opinion that these proceedings by the commissioner are voidable by an attaching creditor, and it appearing in the present case that no proper service was made on the debtor, if his last residence was in Suffolk, and that there was no jurisdiction in the commissioner for Suffolk, if he did not have his last place of abode there, it is impossible to sustain the proceedings, and an order to stay all further action by the commissioner is proper to be made by this court, agreeable to the prayer of the petitioner.

Supreme Judicial Court of Massachusetts, Bristol, ss. April Term, 1851.

Before Mr. Justice METCALF.

ICHABOD BASSETT, APPELLANT FROM DECREE OF JUDGE OF PROBATE.

The will of a *feme sole* is revoked by her marriage.
The marriage of a woman, who, when unmarried, had made a will, is a change in the condition or circumstances of the testator, within the exception to the provision of Rev. Stat cap. 62, § 9.
The knowledge and assent of the husband to the will before marriage, and his promise before the marriage to sign the will after marriage, are of no legal effect.

THIS was an appeal from the decree of the judge of probate, disallowing the last will of Lois Bassett. The facts of the case are as follows.

Lois Bassett, a *feme sole*, made her will, devising certain real and personal estate, which was duly executed, Dec. 25, 1844. She afterwards, on the 20th Oct. 1849, was married to Henry Field, one of the defendants. The said Lois and Henry were at the date of their marriage, and afterwards to the time of her death, residents of Taunton, Mass., but were married in Smithfield, Rhode Island. Said Lois Field, formerly Bassett, died in 1850, without issue, leaving her husband surviving. After her death Henry Field, the husband, admitted that he knew, before his marriage with the said Lois, of the existence of said will; that he assented thereto, and promised to sign the same after said marriage; that he had been ready to sign said will whenever his wife wished; and that once, during coverture, he went to sign the will, but for some reason did not do so.

When the will was presented for probate, the husband and some of the heirs at law objected thereto, and it was disallowed; and the executor named in said will takes this appeal, which was heard before Mr. Justice Metcalf.

N. Morton, for the appellant.

Chester J. Reed, for the appellees.

METCALF, J.— The Revised Statutes (ch. 62, § 9) provide that wills shall be revoked only by certain acts therein specified, except "the revocation implied by law from subsequent changes in the condition or circumstances of the testator." This exception includes the present case. For

the testatrix appears to have been legally married, after making her will, and it is an old and settled rule of law, that the will of an unmarried woman is revoked by her marriage. This rule is expressly enacted by the Revised Statutes of New York, and also by the English statute 1 Vict. c. 26, § 19, except in the case of a will made in the exercise of a power of appointment, when the estate would not, in default of appointment, pass to the heir, &c. of the testatrix. The husband, by the marriage, becomes seized of the wife's real estate, and acquires the right to her personal property and choses in action, notwithstanding any will by her previously made. See *Hodsden* v. *Lloyd* (2 Bro. C. C. 541); 1 Jarm. on Wills, c. 7, § 1; 4 Kent, Comm. (6th ed.) 527; 3 Mylne & Keen, 381.

The husband's knowledge of the will, in the present case, and his parol assent to it, before marriage, did not prevent the revocation by the marriage. 2 Roper on Husb. and Wife (1st ed.) 70–72. Nor were his assent to the will, and his promise to sign it, after marriage, of any legal effect. He had a right to revoke that assent, during her life, or after her death; and he would have had that right, even if she had made a will, by his consent, after marriage. *Brook* v. *Turner* (2 Mod. 170); 1 Williams on Executors, (1st ed.) 41.

The statute of 1842, c. 74, which was referred to in the argument, has no bearing on this case. It relates to wills made by married women, and not by women before marriage. And it requires that the husband's assent shall be expressed in writing, and indorsed on the will.

A marriage settlement may be made, upon such considerations and with such solemnities, as authorize the female party to dispose of her property by a will made afterwards and before marriage; and such will may take effect as an appointment, notwithstanding the subsequent marriage. *Logan* v. *Bell* (1 Man. Grang. & Scott, 872.)

Decree affirmed.

District Court of the United States for the District of Mass., March Term, 1852.

UNITED STATES *v.* HENRY C. PITMAN.

Indictment — Jurisdiction of the United States Courts — Construction of the "Crimes Act" of 1825, ch. 65, § 9.

THE defendant, master of the ship Sterling, of Boston, was indicted, jointly with Samuel N. Dixey, master of barque Missouri, of New York, and also upon two separate indictments upon the 9th section of the statute of 1825, ch. 65, commonly called the "crimes act." The statute provides, "That if any person or persons shall plunder, steal or destroy, any money, goods, merchandise or other effects, from or belonging to any ship or vessel, or boat or raft, which shall be in distress, or which shall be wrecked, lost, stranded or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States," &c.

To the indictment Dixey pleaded guilty, and Pitman, having put himself upon trial, was found guilty by the verdict of the jury.

Upon motion for a new trial, the point of which sufficiently appears in the opinion of the court — *held*,

That a vessel stranded, &c. in a bay, in the Island of Sumatra, was stranded, &c. within the admiralty and maritime jurisdiction of the United States;

That the word "steal," in the ninth section, is not used in the common law sense of larceny;

That the word "plunder," used in the same section, is a word of very broad and general description, including the criminal taking of the goods of another, by open force, or by secret fraud and furtively, from a vessel in distress, &c., and that in the present case it includes embezzlement by the master and others.

SPRAGUE, J. — The various points made by the defendant, in this case, upon his motion for a new trial, resolve themselves eventually into two. One of these, is the objection to the jurisdiction; the other, that the verdict ought to be set aside, as being against the evidence and the weight of evidence. The defendant was tried upon three several indictments, which, by agreement, were consolidated for

the purpose of this trial. These were so framed, that every contingency contemplated by the statute was covered by some one indictment, or some one count of the several indictments. Indeed, under the decisions in 12 Wheaton (*U. States* v. *Coombs*, p. 72), if the evidence in this case had shown the property plundered to have been separated from the vessel and taken upon the shore, the indictment would still have been quite sufficient to support the case. The evidence submitted to the jury was, that the vessel missed stays and went upon the beach, stern first, and was there stranded upon the shore. There can be no doubt that she was stranded, when she touched the strand; nor any possible doubt that she was then within the jurisdiction of the United States and of this court. If, afterwards, she had gone high and dry, she would still have been stranded and wrecked within the jurisdiction. She was upon a beach or shore of the Island of Sumatra, upon a barbarous coast, upon an arm or inlet of the sea, but still upon the sea. If, for instance, the seamen had there committed a revolt or mutiny, there can be no question they would be held. But in the present instance, the money was in fact taken on the sea; it was taken from the wrecked vessel into a boat to be transported to the Sterling, and thus, when plundered, was actually on the sea, and so absolutely and in every sense within the admiralty and maritime jurisdiction.

The other point raised is, that the verdict is against the weight of evidence, because the testimony did not sufficiently show that the money was plundered. Some question was made, that the money in question was taken from the wreck, whereas the averment of the indictment is, that the money was belonging to the vessel. The statute is in the alternative. Its expression is, "from" or "belonging to;" and it is evident, that money so taken from the wreck was belonging to it. The indictment alleges that this money the defendant did "plunder, steal, take and carry away." As the statute makes it the offence, to plunder or steal, if the evidence prove either of these alternatives it is sufficient.

It is suggested that the word "steal" involves the crime of larceny. But the principle upon which the court decided the other case (W. R. Pitman, charged with receiving stolen goods, under the 6th sect. of statute of 1825), is inapplicable in the present case. The larceny provided for under

the 6th section is larceny at common law. This meaning has no reference to sect. 9th, and should not apply it to that section if it were necessary here to give any construction to the phrase. But it is not necessary, for the language of the statute is plunder or steal. Now, as to the word "plunder," I would remark, that no instructions were asked for the jury as to the meaning of this word, nor was any argument made by counsel upon this point. It was left to the jury, therefore, to determine whether plundering was made out. The word is, in fact, used in this section in its popular sense, in such a sense as would be understood by seamen, for instance, and as it would be used and understood in ordinary conversation. The jury found no difficulty in understanding it. It is contended by counsel, that "to plunder," means to take "by force." But although this is undoubtedly one sense of the word, it by no means expresses its full meaning. The various lexicographers who have been quoted at the bar, inform us that it means as well, taking by fraud. And so, in the authority quoted by the District Attorney from the Scriptures, where the word "to spoil,"* which the lexicographers give as one of the original synonyms of plunder, was applied to a taking of property, of which the possession was originally obtained by consent. But it does not rest here. So long ago as the time of Judge Peters, it was practically adjudged by him that plundering was equivalent to embezzlement. 1 Pet. Ad. Dec. 239–242. And further, it will be found by reference to the shipping articles used in England and this country, that the word "plunderage" is used in them in a manner to imply, not a forcible taking, but a fraudulent taking, in fact an embezzlement. And this word "to plunder" is one of very general meaning. It embraces robbery, and embraces as well all other fraudulent taking. If a vessel were openly attacked and robbed, she would have been plundered. If she had been deserted by her company and was then despoiled, it would be the same; and so, if it were done by night and furtively, the same word would be applicable. And I cannot doubt, that within the true meaning of this word the evidence not only warranted but required the verdict. The motion for a new trial is accordingly overruled.

George Lunt, U. S. Attorney, for United States.

R. Choate and *Cyrus Cummings*, for defendant.

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* Exodus, xii. 35, 36.

Abstracts of Recent American Decisions.

Supreme Court of Massachusetts, March Term, 1852.

Action — Master and Servant — Infant. Trespass on the case for an injury, by an accident from a defect in a switch-rod on the defendants' railway. The plaintiff, a minor, was in the employ of the defendants with his father's consent. The switch-rod, when made, was examined by the second foreman of the defendants' machine shop, who testified that he thought it safe. *Held*, that the defendants' liability to the plaintiff was not varied by his infancy, he being lawfully in their employ, with his father's consent; that he could not recover for an accident occasioned by the negligence of his fellow workmen; and, whether or not the injury was occasioned by negligence in the defendants, as a corporation, and not in their agent, being an original defect in the road, that for such defect they would be liable only for the want of ordinary care, and that the case showed such care on their part. — *King* v. *Boston & Worcester Railroad Co.*

Action, Surviving of. Two actions of trespass on the case by administrators, (under St. 1841, c. 89,) to recover damages for injuries to the persons of their intestates. In the first case the injury occasioned instantaneous death; and it was *held*, that the action could not be maintained by the plaintiff, as no cause of action accrued to his intestate during life. In the second case, the injury occasioned the death of the intestate, but there was evidence that the deceased, when first seen, gasped, and exhibited some slight muscular action, but no consciousness: and it was *held*, that there was not sufficient evidence of remaining life on which a jury could find that there was a period of life between the injury and the death, during which a cause of action could accrue; and that in this case, therefore, as in the other, there was no cause of action to survive. — *Mann, Admr.* v. *Boston & Worcester Railroad Co.; Kearney, Admx.* v. *Same.*

Bond — Execution — Judgment. Debt on a bond, to dissolve an attachment under the insolvent law. (St. 1838, c. 163, § 20.) More than thirty days after judgment against the party whose property was attached, having elapsed without any satisfaction thereof, he was committed in execution, gave notice of his intention to take the poor debtor's oath, and was, a few days after, discharged on taking it. After the notice, but before the discharge, this action was commenced against the present defendant, his surety. *Held*, that the breach of the bond by a failure to satisfy the judgment in thirty days, fixed his liability as obligor, which continued in spite of the commitment, and, that whatever the effect of the imprisonment, had it continued, might have been as to the damages on a hearing in chancery, as the commitment had proved unavailing, there was no reason why the plaintiff should not have judgment for his debt and costs. — *Murray* v. *Shearer.*

Constitutional Law — Retrospective Statute. (See *Railroads. Judgment.*) Three writs of error to reverse judgments of C. C. P., February Term, 1850, sentencing the plaintiff in error on three several indictments for uttering counterfeit bank bills to four, two, and two years respectively. By Rev. St. c. 127, §§ 6, 7, the plaintiff should have been sentenced as a common utterer of such bills. St. 1851, c. 87, provides that whenever final judgment in any criminal case shall be reversed by the S. J. C. on error for error in the sentence, the court may render such judgment thereon as should have been rendered. *Held*, that the legislature might enact suitable restrictions on

criminal as well as civil remedies; that this statute was not *ex post facto*, nor retrospective in such sense as to be unconstitutional, and that the proper judgment in this case might now be rendered. — *Jaquins* v. *Commonwealth.*

Damages — Libel — Verdict. Motion to set aside a verdict for the plaintiff in an action for libel, on the ground of excessive damages. *Held*, that in actions such as those for libel and slander, where there was no precise measure of damages, but compensation was given for wounded honor or feeling, and for an injury to reputation, it was not sufficient that the damages were more than the court would have given to justify setting the verdict aside. They must be excessive, outrageous, such that every one would exclaim they were wrong; that here, although the court thought the damages much too large, so large that it was highly proper the question should be raised, yet as there were aspects of the case in which the libel might have been regarded as considerably injurious to one in the plaintiff's situation, which might have operated on the jury without any violation of duty by them, so far as appeared, the verdict should not be set aside. — *Treanor* v. *Donahue.*

Drains and Sewers — Taxes. Assumpsit for a tax assessed for a sewer in the city of Boston. The plaintiff owned a vacant lot, abutting on the street through which the sewer was constructed; his lot was in no way drained by or into the sewer, and he contended that he was not liable until he entered a drain into, or in some way used the sewer. The assessment was proportioned to the value of the abutting lots, exclusive of buildings. *Held*, that this mode of assessment was legal and constitutional, that the *potentiality* of using a sewer determined the lots to be assessed, and that the assessment was to be laid upon lots, which might in any way be so used that a benefit would be derived from the sewer, and might be at once collected, although there was no actual or immediate use of the sewer for the lot assessed. — *Wright* v. *City of Boston.*

Evidence — Insolvency. Assumpsit for work, part at least by the plaintiffs' hired workmen, and materials. The plaintiffs' books with their suppletory oaths were offered in evidence. The entries were first made by one of them on a slate, and subsequently copied into the day-book by the other. The other did not verify the copies, and the party who copied could not say but that several days might have elapsed, although confident, for a certain reason, that the entries were copied daily. After the commencement of the action, the defendant went into insolvency, and the plaintiffs presented their claim for allowance. The defendant was ordered to procure and file his discharge; but he did not do so, and a year after on trial objected that the court ought not now to try the case, and had no jurisdiction, the plaintiffs' claim having been submitted to the jurisdiction of the Commissioner. *Held*, that the books were admissible; that the entries' being first made on the slate, was no objection to their admissibility; that there is no inflexible rule requiring entries to be made the same day work is done or materials furnished; that each case depends on its own circumstances, and much must be left to the discretion of the judge presiding at the trial; that as to the day's work it was no objection that other evidence might be obtained, books not being secondary evidence; that a continuance on a suggestion of insolvency was matter of discretion, here wisely exercised, but to the exercise of which no exception lay; and that the presentation of the claim to the Commissioner did not affect the jurisdiction of the court, being merely a collateral proceeding to reach the debtor's assets. — *Barker et al* v. *Haskell.*

Evidence — Verdict, when conclusive. Replevin for a piano. The plaintiff G. offered in evidence, the record of an action brought by the defendant B. against himself, for a trespass committed in breaking and entering B.'s premises to obtain possession of the piano when replevied, in which the

declaration alleged, that the now plaintiff broke and entered, &c. &c., and carried away a pianoforte belonging to B., also parol testimony that the title to the piano was brought in question in that action, and that the jury stated in answer to an inquiry from the judge, that they found the title to be in the present plaintiff. *Held*, that a verdict is conclusive only as to a fact directly put in issue on the record or essential to the verdict, and that as the title to the piano was but a collateral fact, the taking being matter in aggravation of the trespass only, the finding of the jury upon that point in the former action was not conclusive in this. And *quære*, whether it was competent evidence. — *Gilbert* v. *Thompson*.

Evidence — Sheriff — Bail. In an action against a sheriff for taking insufficient bail, it is competent for the defendant to introduce evidence of the pecuniary inability of the debtor, at the time the execution issued, to show the actual damage to the creditor. It is not necessary that it should relate to that precise period, and evidence of his condition three months before was held admissible. — *Danforth* v. *Pratt*.

Executors and Administrators — Contract. Assumpsit against an executor, on an alleged written promise to pay the debt of his testator. The defendant had loaned money belonging to the estate, to a firm of which he was a member. The firm afterwards became insolvent, and the money was not paid. The defendant was removed from his trust, and, subsequently, in answer to a letter from the plaintiff, after stating some facts relative to the estate, the loss above mentioned, &c., he added: "And if mortification and chagrin would pay the unpaid portion of my brother's debts, they would have been paid three years since. And now if I should have the ability, it will be the first act which I shall perform to place in their hands the amount which was lost by the firm of J. H & Co., and which would have paid to them not far from two-thirds of their several claims. To you, particularly, whose kindness towards my brother was always affectionately spoken of by him, I must be allowed to say, that I most deeply and sincerely regret that your claim remains unsettled." The defendant was admitted to be of sufficient pecuniary ability to pay the plaintiff's claim, and the amount lost by the estate through the failure of his firm. But it was *held*, that these words contained no promise to the plaintiff on which an action could be sustained by him — *Tucker* v. *Haughton*.

Frauds, Statute of — Delivery. Assumpsit for goods sold and delivered. Defendants gave plaintiffs' agent a verbal order for coal to be shipped from Baltimore by plaintiffs, in a vessel drawing not over ten feet, at a freight not over $2.25 per ton. The coal was shipped on board a vessel drawing nine feet nine inches, for $2.45. A bill of lading, expressing that it was to be delivered to the agent, for the defendants, or to his assigns, was forwarded to the agent; he indorsed it, and offered it to the defendants with a bill of the coal, reducing the price twenty cents per ton. But they at once refused to receive it, and subsequently refused to receive the coal when tendered. It was proved at the trial, that when coal is ordered in Boston from Baltimore, by the usage of the trade, the delivery on board a vessel consigned to the person ordering it, is a compliance with the order, and the coal is thereafter at the risk of the party ordering it. *Held*, that the delivery on board the vessel was not a receipt of the coal within the 4th section of the statute of frauds, and that the case was not within the usage set up, as the coal was not consigned to the defendants. — *Frostburg Mining Co.* v. *New England Glass Co*.

Indictment — False Pretences. Indictment for obtaining the money of A. C. by false pretences. A. C. was a married woman, having a husband living, but who had been absent for about three years on the coast of Africa. He supplied her with funds for the support of herself and her

family in Boston, and the money obtained of her was part of such remittance. The judge presiding at the trial in the Municipal Court, instructed the jury, that if they found at the time of the transaction he had been absent three years, was not intending to return soon, had fixed no time for his return, and had left his wife and family in Boston without other means of support than those supplied by him as above, and sent this money to her to be disposed of as she should choose, without interference or control on his part; and the defendant, in obtaining the money, treated and acted with her as a *feme sole*, and obtained it of her as her money, and gave her his notes payable to her; such facts would be sufficient to sustain the allegation that the money was her property; and the defendant was found guilty, but the Supreme Court held otherwise, and set aside the verdict — *Commonwealth* v. *Davis*.

Indictment — Larceny. Indictment for receiving stolen goods, charging a larceny by M. and a receiving by the defendant. The alleged larceny consisted in M.'s converting to his own use bank bills, obtained on a check entrusted to him by his employer and master, F., to draw the money and apply it for F.'s use. *Held*, that the larceny being alleged, it must be proved as alleged; and that these facts did not constitute a larceny. — *Commonwealth* v. *King*.

Judgment — Constitutional Law. Debt on a judgment in Connecticut. B., R. & E., partners, did business in Connecticut as the N. E. C. Co. They had published a notice stating that as partners, they would continue the business of the Company, and that E. would act as agent. E. alone lived in Connecticut, and in the former action was alone served with process. By his authority an appearance was entered in the usual manner for the defendants in that action, not expressed to be intended otherwise than for all; but in the extended judgment it was not stated that B. appeared. No special authority from B. to appear for him was given to E. or any other person. By the laws of Connecticut, service on one joint contractor authorized a judgment against the firm. *Held*, that E. had no authority as partner or agent to enter an appearance except for the firm, as such, to protect its property and interests in Connecticut, liable to be affected by a judgment there; that *primâ facie* his appearance was for that purpose, and could give no jurisdiction over B. individually, and that an action on the judgment could not be sustained against B. in this State. — *Phelps* v. *Brewer*.

Landlord and Tenant — Lease — Assignment — Surrender. Assumpsit for rent, &c. B. leased the premises March 6th, 1845, by indenture under seal to P., who covenanted to pay rent, &c., said covenants being guaranteed by an indorsement on the lease by C. and L. Said lease and guaranty were never formally cancelled. P. occupied and paid rent, &c. until September 26, 1846, when D. signed and delivered to him a writing not under seal, by which he agreed to take said lease, pay to B. the rent &c., and to take P.'s place in all cases so far as the premises P. and B. were concerned. P. left, and D. entered on the premises without B.'s knowledge or dissent, occupied till August, 1847, and paid rent until October of that year. The bills for his rent were: — "P. to B., Dr. To one quarter's rent; received payment for B. T. B." In August D. left, and verbally notified the guarantors of his intention to leave. *Held*, that the writing was not a legal assignment of the lease; that assumpsit will not lie for rent reserved by deed, even on an express promise to pay the same; that there was not sufficient evidence to show a surrender of the lease and the substitution of D. as tenant at will to B., but that B. might recover the rent due on the general ground, that where A. promises B. to do something for C., C. may sue A. in assumpsit for a breach, although P. had his remedy on the agreement,

and was still liable on the lease, and that a consideration between P. and D. alone was sufficient. — *Brewer* v. *Dyer*.

Landlord and Tenant — Lease — Covenant. Debt for rent on a lease of premises "as a dwelling-house." The lease contained an agreement "that the owner should not be called upon or liable for any repairs whatever during the lease, the house being now in perfect order." Defence, that the tenant had left the premises with notice on account of a noisome stench existing at the time of letting, which rendered the house uninhabitable, arising from a defect in the drain. *Held*, that there was no special warranty as to the habitable condition of the house in the clause quoted, and that there is no implied covenant on the part of one leasing premises for a dwelling-house, or any other purpose, that they are fit for the purpose for which they are leased. — *Foster* v. *Peyser*.

Limitations, Statute of — Executors and Administrators — Sale — Infant. Writ of entry. The demandant claimed as one of the residuary devisees of H., at whose death he was a minor. Neither he nor others of the devisees who were minors ever had any guardians. The tenant claimed through mesne conveyances under a deed from H.'s executors, under a probate license to sell real estate to pay debts. There was no record in the Probate Court of any evidence of the publication of the notice of sale. The demandant had resided in this State for five years after his majority, and after the period at which his alleged title accrued. *Held*, that the authority of the executors to make the sale was not impaired by the absence of guardians; that to bring such action within the limitation of Rev. Stat. c. 71, § 37, it was not necessary to prove the sale to be a valid sale, and that it was therefore barred by the lapse of five years as aforesaid. — *Holmes* v. *Beal*.

Mandamus — Poor Debtors. Petition for a mandamus to justices of the quorum to admit a debtor to examination for his oath. The debtor applied to two magistrates for his oath. The creditor filed charges of fraud against him under Rev. Stat. c. 98, § 27, *et seq.* These were tried, the debtor found guilty, and an appeal taken, which was still pending, to the Court of Common Pleas. The magistrates examined him, and refused the oath. He then applied to the respondents. The creditor again appeared and filed the same charges, and the petitioner pleaded the pending appeal as a bar to the same, and demanded to be examined, but they refused, unless he would join issue, and be tried on the charges of fraud, and he now asked for a mandamus requiring them to examine him for his oath. *Held*, that the trial on the charges might be renewed as often as the petitioner renewed his application for the oath; that a final decision either way, and perhaps the pendency of an appeal, would be a bar to a criminal sentence on a second trial, but for the other purposes of the charges there was no objection to a second trial on a second application, and the mandamus was refused. — *Hodsdon, Petitioner*.

Partition. Petition for partition of lands whereof the petitioner was seized of one moiety in his own right, and of the other moiety jointly with the respondents in trust, under a deed executed in pursuance of a power of appointment given by will. *Held*, that proceedings for partition, whether by writ or petition, were in their nature adverse, and that the petitioner being also a respondent, the petition could not be sustained. — *Winthrop* v. *Minot et al.*

Poor Debtors — Notice. Debt on a bond for the prison limits. Defence, a discharge under the poor debtors' act. The principal obligor applied to take the oath, and a citation issued appointing the jailor's house in Salem, at 9 A. M., September 20, as the place and time for the examination. The officer's return stated that he served the citation on the 27th of September, without mentioning any hour in that day. The distance from the

place of service to the place of examination is fifteen miles. *Held*, that a creditor is entitled to twenty-four hours' notice of the time and place appointed for such an examination, with one hour additional (for travel) for each mile from the place of service to that of examination. That the burden of proof was on the defendants to sustain the alleged discharge by proving such notice from an officer's return of the service, and as the return in this case did not show that thirty-nine hours' notice had been given, it was insufficient to sustain the defence. — *Park* v. *Johnston*.

Promissory Note. Action by the payee against the maker of a promissory note, payable "at either of the banks in Portland." At the trial no evidence was offered by the plaintiff of any demand on the defendant for the payment of the note at any bank in Portland, nor did the defendant offer any evidence that he was ever ready to pay it at any such bank. *Held*, that a demand at the place of payment need not be averred or proved in an action on a promissory note against the maker. That a failure to make such demand, the defendant being prepared to pay, if well pleaded and proved, bars damages for detention and costs; but to avail himself of it the defendant must show, by way of defence, that he was ready to pay at the time and place specified, and plead with a *profert in curia*, the defence being equivalent to a plea of tender, and exceptions to a ruling in conformity to the point first stated were adjudged frivolous. — *Carter* v. *Smith*.

Promissory Note. Assumpsit on a negotiable promissory note, payable to the makers' order, and by them indorsed in blank. The defendants offered to show that the note was given for a loan made to them by D., and that B's note to the defendants was left with D. as collateral security; that B. paid his note, took up theirs, and unlawfully caused it to be put in suit in the plaintiff's name, but did not attempt to show that the plaintiff was not an innocent indorsee for a valuable consideration, and the court below ruled that this was no defence without proving notice to the plaintiff; but it was *held*, that where fraud or illegality in making a note, or putting it in circulation, are shown by the defendant, the burden of proof is on the plaintiff to show that he came by it for a valuable consideration. — *Fabens* v. *Tirrill*.

Railroads — Constitutional Law. Petition under Stat. 1845, c. 191, for the appointment of commissioners, to fix the compensation to be paid by the petitioners to the respondents, for drawing the merchandise and merchandise cars of the former over the road of the latter. *Held*, that this statute was no infringement of the respondents' charter, sect. 5 of which provided, that after the road had been opened for use five years, the legislature might reduce the tolls and other profits, but not without consent under ten per cent., as the fourth section of that charter reserved to the legislature the power of authorizing another company to enter on the plaintiffs' road, and of fixing directly, or under a general law, their compensation therefor; that sect. 5 related to tolls on the road, sect. 4 to compensation for drawing merchandise and passengers for other roads, and that commissioners should be appointed to settle the compensation for both of these; but if the parties had agreed as to either, it was no ground of objection to their appointment. — *Vermont and Massachusetts Railroad Company* v. *Fitchburg Railroad Company*.

Taxes — Partnership. Assumpsit by a firm of booksellers and publishers, three in number, for a tax. The plaintiffs owned a building in Cambridge, where one only of them lived, part of which was let to a firm of printers and part to another firm of bookbinders, each agreeing to do all the work of the plaintiffs, so far as able, part at agreed prices, part at the prices plaintiffs had been accustomed to pay. On the same estate were small buildings, not let, used for the storage of stereotype plates, paper and printed sheets, belonging to the firm, and on their contents the tax was

assessed. The plates were used both in Cambridge and Boston. *Held*, that the plaintiffs had not a place of business in Cambridge, under Rev. Stat. c. 7, § 13, which provides that partners may be taxed in every place of business for the proportion of property there employed, and that the tax was not rightly assessed either under sect. 13, or under sect. 10 of that chapter, or Stat. 1839, c. 139, which relate to stock in trade, &c. — *Little et al* v. *City of Cambridge.*

Trustee Process — Execution — Judgment. *Scire facias* under Rev. Stat. c. 109, § 38, against a trustee. The trustee was summoned and charged in the original suit; judgment was recovered by the plaintiffs; an execution issued in the usual form, and was delivered to an officer, who demanded of the trustee the defendant's "goods, effects and credits;" but the trustee refused or omitted to deliver them, or to pay any money to him. The officer afterwards committed the principal defendant to jail on the execution, and he was discharged, on taking the poor debtor's oath. *Held*, that a commitment in execution is no satisfaction of a judgment in this commonwealth; that the trustee was made liable to the *scire facias*, by a demand on him for "the goods, &c." of the principal defendant, and his refusal or omission to deliver them, or to pay money to the officer, which liability was not discharged by the commitment, or by the election of the plaintiffs to commit their debtor. — *Cheney* v. *Whitcley.*

Will. Bill in equity in the nature of a bill of interpleader, by the executor of J. B., whose will contained the following clauses: —

"If my cousin, E. A. P., shall survive me, he shall be paid two thousand dollars, and the like sum shall be paid to my cousin H. B. P., and if he shall not survive me, his issue shall take said sum.

"I give to my cousin, Mrs. B., two thousand dollars, which sum shall go to her issue, in case she shall not survive me.

"All the residue of my estate, real, personal and mixed, I give and devise unto J. R., M. B. B., E. A. P., H. B. P., E. S. Q., M. S. Q., M. M. Q., A. C. L. Q., A. P. Q., and to their heirs and assigns forever; if said J. R. shall die in my lifetime, his issue shall take his share of said residue; but in case any of the other residuary legatees shall not survive me, his or her share shall go to the survivors."

On the 6th of June, 1849, six days after the making of the will, B. made the following codicil to his will: —

"Upon a reperusal of the preceding will, I find that my intention in respect to the legacies thereby given to Mrs. B. and her two brothers, E. A. P., and H. B. P., is not carried into effect.

"I therefore, in this particular, declare my will to be, that the sum of six thousand dollars shall be taken by Mrs. B. and her brothers, or those of them who shall survive me, they to share alike; but if all these persons shall die in my lifetime, then said sum shall sink into the residue of my estate.

"I declare this provision for said legatees to be in lieu of, and as a substitute for, that made in their behalf by the afore written will, and this writing shall be taken as a codicil thereto; hereby ratifying said will in all other particulars."

The question was, whether the codicil revoked the residuary bequest as to Mrs. B., E. A. P., and H. B. P., (Mrs. B. being the M. B. B. of the residuary bequest.) *Held*, that the provision in the codicil was intended by the testator as a substitute only for that first made in favor of those legatees, his object being not to declare any change of intention, but to carry out the intention already imperfectly expressed, modifying the first bequest in certain particulars, and ratifying his will in all others. — *Quincy* v. *Rogers et al.*

Miscellaneous Intelligence.

RETIREMENT OF MR. JUSTICE PATTESON. — It being generally known that this was the last day (Feb. 10th) upon which Mr. Justice Patteson would occupy his seat upon the bench as one of the Judges of this Court, a crowd of barristers and of the public thronged the Court from an early hour, in expectation of hearing the parting address to be delivered by the Attorney-General to his Lordship upon his retirement. As the day advanced, every corner of the Court, as well as the galleries, became crowded by anxious spectators of the interesting scene which was about to take place. At about 3 o'clock Mr. Justice Erle came into Court, and took his seat beside Mr. Justice Patteson. Soon after,

The Attorney-General rose, which was a signal for the whole bar to rise, while the learned gentleman, as the head of the bar, prayed permission to address a few words to the learned Judge, whom, he regretted to say, he saw for the last time in that Court. The learned Attorney-General then proceeded thus: — "Mr. Justice Patteson, I am charged by my brethren of the bar to convey to you our common regret and sorrow, that we see you for the last time on that bench, which, for nearly twenty-two years, you have occupied with such infinite honor to yourself, and such unbounded satisfaction to the profession. And as we are now about to lose you, it may be neither unbecoming in me to offer, nor wholly unwelcome to yourself to receive, an assurance of the unanimous sense of the entire profession, that the high and sacred duties of the judicial office have never been more efficiently, honestly, or ably discharged, than they have been by yourself, during your whole judicial life. Though we lose you, the memory of you will yet live, associated with those revered names which dignify this Court, — not more for that vast and varied learning by which we were able to profit, and which was universally admired, than for your untiring love of justice and truth, your hatred of oppression and wrong, that unflinching integrity of purpose, and singleness of heart, and that kindness of nature, which left us in doubt whether we should more revere the judge, or love the man. Your Lordship will carry with you into your retirement the enduring attachment of every member of the profession. We rejoice to think that, though the sense of infirmity and the apprehension that it would interfere with the due discharge of your duties have led to your retirement, you withdraw in the vigor of unimpaired health. We hope and pray that in that honorable retirement, which you have so well earned, you will still enjoy long years of happiness, and with full hearts we bid you an affectionate and respectful farewell."

The speech of the learned Attorney-General, which was pronounced with intense feeling, was followed by loud applause from the strangers present, which was immediately checked by the officers of the Court.

Mr. Justice Patteson then said: — "Mr. Attorney-General and gentlemen of the bar, I receive with the highest satisfaction and with feelings of the deepest gratitude, this very kind expression of your feelings. Of the entire sincerity of what you have said, I have not the shadow of a doubt. And, though painfully conscious that the sentiments you have expressed are far beyond what I have deserved, I will not be guilty of the affectation of supposing that such praise, coming from such men as you are, can be wholly undeserved. Mine is one of many cases which show, that if a public man, without pre-eminent abilities, will but exert such as God has

given him, honestly and independently, and without ostentation, he will receive a meed of public approbation commensurate with and even exceeding what he has deserved. Thank God, if I have been not wholly deficient in the use of those talents with which he has intrusted me! It is with great regret, that while still in the possession of much bodily and mental health, I have found myself compelled to retire from a profession in which I have always taken, and shall still continue to take, the greatest delight. It is not now for the first time I have contemplated such a step. I have had to avoid, on the one hand, the premature surrender of my office while I found myself able to perform its duties, and on the other the danger of clinging to it when my infirmities might make it due to the administration of justice that I should retire. I have endeavored, with the kindest advice of my brethren and the assistance you have rendered me, to avoid either extreme. But I am sadly afraid that I have deferred my resignation too long. [Loud cries of 'No, no,' from the strangers in the Court.] I have been obliged to make use of ingenious instruments which assist the hearing, and are so great a comfort both in public and private life. But they cannot prevent the increase of the infirmity Of this I am confident and sure, that nothing but the unceasing kindness of the bar, and considerable exertions on my behalf, sometimes painful and sometimes distressing, and the ready and affectionate support of my brethren on the bench, could have enabled me to have continued so long as I have done. I am aware that, in some instances, I have given way to impatient expressions towards the bar and witnesses in Court, as if they were to blame, when it was not they, but my own infirmity, which was to blame. I have been, and am, heartily sorry for such a want of command over myself, and have striven against a repetition of it, earnestly, but not always with success. My brethren, you and the public have been very kind to me, and I shall ever retain a grateful recollection of that kindness. That will be a great solace to me, and will remain to me as long as my life shall last. I bid you now an affectionate farewell. I wish you many years of health and happiness, as well as success and honor in a liberal profession, the duties of which have been and are discharged not only with the greatest zeal, learning, and ability, but with high honor and integrity, and a deep sense of responsibility to God and to man ; and which being so performed, in my humble judgment, are eminently conducive, with the blessing of God, not only to maintain the just prerogatives of the Crown, but the rights and liberties of the subject."

The above address, delivered in his Lordship's usual style of unaffected simplicity, was listened to with the deepest attention and interest by the bar, who stood during its delivery.

The Court then rose, and his Lordship retired.

Goodyear *v.* Day. — The case of Charles Goodyear *v.* Horace H. Day, which is so important on account of the amount of property depending upon the result, and so interesting from the distinguished counsel employed in it, was partially heard at Trenton, at the March Term of the U. S. Circuit Court. Two cases were pending between the parties, one at law and one in equity, but both were brought to establish the validity of the patents held by the plaintiff for manufacturing India rubber goods. The court was held by Judge Grier and by the District Judge, and the question discussed was, whether the court would in the case in equity hear the evidence and decide upon the validity of the patents, or would submit the action at law and the various questions of fact involved in it to a jury for their decision.

The plaintiff claimed that the court should hear all the questions of law and fact, and decide upon them without the aid of a jury ; while the defendant's counsel argued, that as the main matter in dispute was upon the

great question whether Goodyear was the real inventor of the fabric for which he had a patent, it was the defendant's right to have that issue tried by a jury, before an injunction should be issued against him.

The discussion of these questions occupied the court for over a week, and the evidence in the case was argued so far as it was material to the question before the court, and the whole subject of the practice in chancery as to the decision of disputed facts by the aid of a jury, and the power of the court to grant an injunction on patent cases when the validity of the patent is denied, was examined with great ability.

This case is a very important one, and the decision is looked for with great interest. This is the first time when the courts have been asked to grant an injunction in a patent case (unless when the parties have agreed to submit the questions of fact to the court) before the validity of the patents has been established by a verdict, and as a matter of practice the issue of this trial will be decisive. It is important for the profession and the public that this question should be determined, and that the province of the court in determining disputed questions of fact should be accurately defined.

The counsel for the plaintiff were Hon. Daniel Webster, and James P. Brady; for the defendant, Hon. Rufus Choate, and Francis B. Cutting. And the great question of the right to a jury trial, was argued with the eloquence and ability which might have been expected from such advocates.

It is said that the testimony taken in this case extended to nearly three thousand printed pages, and that nearly two hundred witnesses had given depositions in the case.

We give the following extract from a letter, published in the New York Evening Mirror, March 30, 1852, which shows how Mr. Choate's argument was regarded by the New Jersey Bar.

"We must not be misunderstood that his eloquence is only word-music, for there is nothing in him of the merely fluent speaker. This whole speech was kept strictly within the limits of the question in debate, and although there were occasions enough for the commonplaces of declamation which an ordinary man would have taken advantage of, he seemed to disdain all these, and in the consciousness of his great powers confined himself to the purely legal question before the court. The grave judges and gray-haired lawyers listened with evident approval to the legal wisdom of the logical argument, which charmed the less instructed audience by its brilliancy, and humor and pathos. We had been led to suppose that Mr. Choate was somewhat florid in his style, and that he might sometimes neglect reason and judgment for the sake of effect, but this is great injustice to his genius. The excitement of the moment is now over, and we have heard from our New Jersey lawyers who are here in attendance upon the court, their unanimous and earnest praise, not only of the eloquence of the orator, but of the sound argument, the profound legal science, and the trained accuracy of the learned lawyer. Such an audience could not be misled by beauty of language alone, and the Bench would frown, and the Bar would smile at the brilliant errors and shallow commonplaces which might mislead a mixed assembly.

"It was very striking to observe the effects of this masterly effort; the learned judges, the watchful lawyers, the crowd of spectators, all were carried away by the magical tones of that wonderful voice. Even his opponents and their counsel seemed to forget their interests, and to follow him in attentive and assenting conviction, as he led them along step by step in his progress. Only in the frowning brows and grave looks of one or two of the older counsel could it be seen, that they did not forget their cause, and that they appreciated the effect of his unanswerable appeals."

"His vigorous and acute intellect give him that logical clearness, and

powerful reasoning, and convincing argument, which form the foundation of his speeches, and with these he knows how to unite his irresistible appeals to the passions and feelings and sympathies of humanity, and that poetical imagination which gives form, and color and beauty to his thoughts."

Law Reform in Maine. — By a resolve of the previous legislature of Maine, "in favor of reorganizing the Judicial Courts," Hon. John Appleton, and George M. Chase, Esq., were appointed commissioners upon the subject. They have made their Report to the legislature, which has been printed, and forms House Document, No. 33. They have made a full report, in which they explain the alterations in the law that they propose in the bills accompanying their report. The changes they propose are,—

1. That the act establishing the District Court be repealed, and its jurisdiction transferred to the Supreme Judicial Court. The reasons for this proposed alteration are substantially, that the final jurisdiction of the District Court is exceedingly limited, and that upon the appeal a trial by jury may be had, thus subjecting parties to the expense and delay, and witnesses to the annoyance of two trials instead of one. As the commissioners well say, "The system of two courts, where in each case a trial by jury may be had, by means of an appeal from one to the other, is one which cannot be theoretically defended, and which in practice is utterly destitute of merit." The objections to the abolition of the District Courts are distinctly met and refuted.

2. Another important innovation proposed, and one which it is thought will be of great utility in practice, is that by which the presiding judge is required to decide any cause, when both parties shall so desire it, without the intervention of a jury. The provision upon this point in no respect interferes with the rights of a party to a trial by jury, but merely makes it the duty of the judge to hear and decide all matters both of fact and law, which may arise in a cause, if both parties so elect, and enter such agreement on the docket, and that his decision shall be final.

3. Another change relates to the proof of documents. It is proposed that when either party, at such time and place as the court upon motion shall appoint, produces for the inspection of his adversary, such papers as he purposes to offer in the cause, he need not prove the signatures to the documents, unless the adverse party shall file an affidavit, in which he shall deny the genuineness of the signature, if it purports to be his own, or shall state his disbelief of its genuineness, if it purports to be that of another, or if there be an attesting witness, that his testimony is necessary and important in the trial of the cause. The object of this change is the honest one of preventing that delay and useless expense which results from a wanton denial of signatures undoubtedly genuine, and which a party may not be able to prove at a moment's notice.

4. The commissioners propose another alteration in the law and practice. It is, that "No judge shall take any part whatsoever in the hearing, deciding or determining any question of law in which exceptions have been taken to his orders, rulings, or decisions, or in which they may be overruled or reversed." The commissioners argue thus in favor of this peculiar proposition, which we think is not borne out by experience.

"To decide the law upon exceptions or report, the exceptions or report should alone influence the judgment. All that has previously transpired should be as though it never had been. But no judge can be expected to erase from his memory the facts which have transpired during the hearing of a cause, nor the opinions which he has then formed. No one would for a moment consider it just or proper, that a juryman should be permitted,

for a second time, to hear and determine a cause which has been carried to a higher tribunal, by appeal from a judgment rendered on a verdict, to which, as a juryman, he had been a party. It is difficult to perceive, in principle, any important distinction between these cases. There is a pride of opinion, varying to be sure in different minds, but from which no one is exempt, which incapacitates, to a certain extent, the individual who has deliberately formed an opinion, from canvassing its correctness with the same impartiality with which another would discuss and determine the proposition which is in dispute. The very paternal instinct favors the retaining a verdict, in the getting of which the presiding judge has acted so important a part. The hypothesis upon which so remarkable an anomaly must rest, would seem to be, that a judicial position divests the judicial mind of that pride of opinion, and frees it from those prejudices, to the sinister influence of which the rest of humanity is so undeniably exposed. Unless the judicial station should be deemed, by force of its office, exempt from the ordinary frailties of humanity, it would very obviously seem proper that it should not unnecessarily be exposed to influences which might unintentionally and unwittingly, on its part, interfere with and obstruct an impartial administration of justice.

"For these or other reasons, many have deemed it so important that the law court should be distinct from the court by which jury causes are tried, that they have advised a separate court, whose exclusive and only duty should be, to decide upon all questions of law which might arise at *nisi prius* requiring adjudication; and that the judges, who are to determine the law, should be a distinct tribunal from that before which the trial of fact was had."

"The provision we have suggested accomplishes, with no inconvenience, all these objects. The Supreme Court of law will in each case be composed of judges, who must form their judgment, and render their decision, upon the papers before them, unbiassed by any preconceived views of the law, or of the fact, free from all pride of opinion — from all anxiety to sustain any particular view of the law — from all reluctance to try again a cause which, from its length or complexity, may have been annoying; while at the same time, the habit of presiding at jury trials gives them that readiness and practical skill in the application of the law to a given state of facts, which can only be acquired in that way."

5. Another change proposed, is to have three terms only for the hearing of all questions of law and equity, which the commissioners think would be a saving of time and expense. By this means "at least one year of judicial time would be saved."

6. The commissioners propose that all probate appeals and petitions for review, may be heard and determined by a single judge at *nisi prius*, with the right of appeal on matters of law, instead of being heard as now by the full bench.

7. The Report advises that the jurisdiction of justices of the several municipal or police courts shall be extended, and that the said courts have concurrent jurisdiction with the Supreme Court in all cases where the debt or damage exceeds twenty, and is less than fifty dollars. If upon entry of the action, either party shall claim a trial by jury, the action will be removed to the next term of the Supreme Court. This change was recommended because "It has been ascertained upon inquiry, that the judgments in a fourth part of all suits pending in the District and Supreme Courts, are rendered for a less sum than fifty dollars."

8. Separate terms for the transaction of the criminal business of the court are recommended.

9. It is proposed that equity cases may be heard at *nisi prius*, and before one judge, upon oral or written proof as the parties may select.

The commissioners say, that "It is highly desirable that parties in all cases should have their witnesses before the court which is to decide upon their testimony. That course which serves best to elicit the truth at common law, must be equally desirable and efficacious for the same purpose in equity."

The commissioners thus conclude their Report.

"The suggestions we have considered, embrace various modifications of existing law, which have been proposed with a full conviction, that, in practice, they will be found of decided advantage in its administration. That they will diminish the expense and accelerate the progress of suits, cannot be doubted. These changes are not necessarily connected, and whatever may be done in reference to retaining or abolishing the District Court, the adoption of the rest will tend materially to promote the speedy performance of the judicial business of the public. Notwithstanding the saving of the time of the court, which may reasonably be expected as resulting from these changes, we have deemed it advisable to recommend that the present judicial strength should be retained. The labors of the Supreme Court are exceedingly arduous, and the learning and ability displayed in their performance, are only equalled by their untiring devotion to the public service. If the legislature should consider that the public good requires the transfer of the jurisdiction of the District, to the Supreme Court, there should be a sufficient number of judges added to the present court, to enable them promptly and without delay to meet all the requirements of the public. This can all be accomplished with diminished expense to the public and to suitors, and the delays unavoidably incident to the present system be avoided"

We are informed that the several acts introduced into the legislature, to carry out the views of the commissioners above referred to, have passed both branches of the Maine legislature with great unanimity, and that the several changes recommended therein are now the law in Maine. The Supreme Court will consist of seven judges hereafter, instead of four as formerly.

Notices of New Books.

A Practical Treatise on the Law of Covenants for Title. By William Henry Rawle. 1 vol. 8vo. pp. 597. Philadelphia: T. & J. W. Johnson. 1852.

Mr Rawle, of Philadelphia, has written an able, interesting and learned book under the above title. The law of conveyancing in the United States is less formal than it is under the English law. This is undoubtedly an improvement, and in some degree may be regarded as a result produced by the freedom of alienation, which is permitted by our laws; this freedom and facility of transferring the title to real property may induce and has induced, frequently, an inaccurate and careless mode of making assurances. It is, therefore, of the utmost importance that the principles of law upon this subject, as recognised by the courts of this country, should be well understood. *The covenants for seisin, of good right to convey, the covenant against incumbrances, and for further assurance*, are some of the subjects considered. A very full and able discussion of "*the covenant of warranty*," illustrated and enforced by an extended reference to the authorities and principles applicable thereto, is given. Several titles are introduced, which are not so familiar to the profession, and so well understood as from their importance they should be; among these are the chapters which re-

late to "*the operation of covenants for title by way of estoppel or rebutter*," "*the purchaser's right to recover back or detain the purchase-money after the execution of the deed.*" The entire work will commend itself to the approbation of those who examine it, as a production of rare merit Mr. Rawle has well discharged the obligation, which it has been said every lawyer owes to his profession, and has devoted, no doubt, much time and research in the production of his treatise In its design and execution it is applicable to the jurisprudence of almost every State in the Union. Mr. Rawle has been willing to devote the time necessary to the preparation of a legal treatise, and has brought to the labor such talents and learning as will command the respect and confidence of the profession. and is entitled to the gratitude of those whose business of life it is to uphold with a stout and fearless heart the integrity and enforcement of private and public right. We commend the book to the examination of our readers.

STATUTES OF THE STATE OF NEW YORK, of a Public and General Nature, passed from 1829 to 1851, both inclusive: with Notes and References to Judicial Decisions and the Constitution of 1846. Compiled and arranged by SAMUEL BLATCHFORD. With a copious Index, by CLARENCE A. SEWARD. 1 vol. 8vo. pp. 1165. Auburn: Derby & Miller. 1852.

The modest title of this work does not give any adequate idea of its contents or its merits It would apply equally well to many editions or compilations of public laws, in which the statutes are merely strung together chronologically, without reference to their subject matter, and with no regard to the fact that they may have been altered or repealed Mr. Blatchford has not been content with such comparatively useless labor. He has made a book upon a far different plan. The work is similar to, but an improvement upon, Gordon's Digest of the Laws of the United States. Hartley's Digest of the Laws of Texas, which we noticed in the last volume of the Reporter, is after the same design.

The subjects of the various statutes are arranged and printed in alphabetical order, and in some instances there are subdivisions of subjects. The several statutes upon these subjects are printed in chronological order. Those statutes which have been expressly or virtually repealed or clearly superseded are omitted; but the title, date of passage, chapter, &c. of such statutes are given in their place, unless the statutes are expressly repealed, in which case the only reference to them is in the repealing statute In cases of amended statutes, they are printed as amended, and have references to the amending act. The book is thus in fact a digest of the statute law of New York, during the period designated therein, and added to this digest of the law is the digest of the decisions upon all the principal branches of the law, which Mr. Blatchford has appended in notes to the various titles.

The great value of this work will be readily perceived when it is recollected that during the twenty-three years whose legislation it contains in a systematized and classified form, the laws of New York have been greatly modified, and the administration and practice of the law have been entirely changed. The constitution of 1846, and the enactments which followed it, by which these changes have been wrought, are given in extenso The code of procedure is published in full, and has a separate index to itself. The index to the whole work is full, and appears to have been faithfully done; and this, with the table of contents and the alphabetical arrangements of the work, will make the reference to any subject simple and certain.

Mr. Blatchford has rendered a great service to the profession and the public. Whoever gives to a people the legislation of their State in such

a form that the unprofessional reader can ascertain for himself the law upon any subject is a public benefactor. The labor of preparing such a book, though great, is without ostentation; but he who performs it faithfully, is eminently entitled to the gratitude of the profession, of public officers, and of the public, for relief from the constantly recurring labor of searching through accumulated masses of legislation to ascertain the actually existing provisions of the laws of the land.

A DIGEST OF ALL THE CASES DECIDED IN THE SUPREME COURT OF THE STATE OF VERMONT, as reported in volumes sixteen to twenty-two inclusive of the Vermont Reports, together with many manuscript cases not hitherto reported; being a Supplement to the Digest of the previous volumes of the Vermont Reports. By PETER T. WASHBURN, Counsellor at Law. Woodstock: Haskell & Palmer. 1852.

The interminable title to this second volume of Washburn's Digest of the Vermont Reports is the only objectionable feature which we have been able to discover in the work. The previous volume of Mr. Washburn's Digest is very widely known, and we believe very justly and very highly appreciated by the profession. There is nothing we could say of the work which has not already been said of the first volume, except, perhaps, that this supplement is, in point of mechanical execution, far superior to its predecessor, from the same press, and although the plan is much the same as the former volume, it is more thorough in affording a complete synopsis of all the cases reported, and many manuscript cases not yet reported, which the praiseworthy research of the author has here for the first time brought to light, and put in an enduring shape.

Digests have now become as indispensable in the investigation of cases, and the development of the practical principles of the law, as diagrams to the geometer, or as maps to the student in geography, and one, who affords us a good digest, performs an important service to the profession, and one which deserves more praise and more pay than it commonly commands. This, Mr Washburn has here done, and we trust he will meet his due reward, both at home and abroad, as well in the "material aid," which is so indispensable in this gold-worshipping age (where the offerings upon the altar of mammon are tenfold the number of those which adorn the shrine of Minerva,) as in the more gratifying and more enduring return, which sustains the spirit of the heart under those exhausting labors which the patient study of the law is sure to bring.

A SYNOPTICAL INDEX TO THE LAWS AND TREATIES OF THE UNITED STATES OF AMERICA, from March 4, 1789, to March 3, 1851. With references to the Edition of the Laws published by Bioren and Duane, and to the Statutes at Large, published by Little & Brown, under the authority of Congress. Prepared under the direction of the Secretary of the Senate. Boston: Charles C. Little and James Brown. 1852. One vol. 8vo. pp. 746.

The value of an accurate index to any law book, which is in itself worth any thing, or to a collection of statutes, especially to a collection of the Statutes of the United States, cannot well be overrated. The statutes of the United States have become so bulky and unwieldy, that without a good index it is an endless and profitless labor to attempt to consult them. It was this conviction which urged the distinguished ex-Senator from Missouri, to push through with energy and success the resolution under which this index has been prepared. We hope that Congress will act upon the recommendation of the President in his last annual message,

and provide for a revision of the Statutes of the United States. We might then expect some symmetry and system in the body of the law, which now it certainly does not have.

The synoptical index has been prepared under the joint resolution of 11 January, 1849. In the execution of the work use has been made of the former index — which has been verified and corrected, the new matter having been incorporated with the old. The using of the old index as a basis, and the correcting the errors therein, gives much greater assurance of accuracy, than if the work were wholly new. The references, as appears by the title, are to the principal editions of the Statutes that have been published. The index embraces all the laws, both public and private, the resolves and treaties. The subjects indexed are arranged in alphabetical order; the dates of the several acts relating thereto in chronological order, and the several provisions of these acts, and the reference to the volumes and pages where the laws may be found, are given in parallel columns. The preparation of the index in this form offers good opportunity to correct errors, and to note and supply deficiencies.

The entire accuracy of such a book can be verified only by actual and constant use. Those who have the most frequent occasion to consult it, speak of it as greatly aiding their labors, and so far as we have examined it, we have found it full and accurate.

United States Digest: Being a Digest of Decisions of the Courts of Common Law, Equity and Admiralty in the United States. By John Phelps Putnam, of the Boston Bar. Vol. IV. Annual Digest for 1850. Boston: Charles C. Little and James Brown. 1851. pp. 585.

The merits of this digest are now well understood by the profession. The labor of its preparation is intrusted to few hands, and is performed under the experienced oversight of the editor, who himself arranges the titles and the cases under the several titles. We notice improvements in this respect in the later volumes of the Annual Digest. There is a fuller reference from one title to other titles on kindred subjects. So that there is a great completeness about the work as a whole.

The present volume embraces three volumes of United States Reports — 8th Howard, Davis and Wallace, Jr. — and thirty-six volumes of Reports of the individual States. An abstract is made of every case in these thirty-nine volumes, and all the points decided are placed under the several titles. There is a full table containing the names and subject matters of the several cases. We would suggest to the editor, to give each year a list of cases that have been questioned or overruled in the volumes contained in the Digest. It could be done with little additional labor, and would give greater value to the Digest.

We are glad to see that it is proposed to include in the subsequent volumes of the Digest the new volumes of the English Reports in Law and Equity, which Messrs. Bennett & Smith are now editing. So that it will contain not only all the American cases, but all the published decisions of all the English Courts. When this is done, we know of nothing in the shape of a Digest that will be more perfect than this.

Digest of the Militia Laws of Massachusetts and Extracts relating to the Militia, from the United States and State Constitutions and the Laws of the United States. Compiled and published for the use of the Militia, in conformity to a resolve of the Legislature, by Ebenezer W. Stone, Adjutant General of Massachusetts. Boston: Dutton & Wentworth, State Printers. 1851.

This Digest includes all the provisions of the Revised Statutes, of the

fourteen different acts, and of the various resolves passed by the Legislature, since 1836, relating to the militia which are now in force. The various contradictory enactments, and indefinite repealing clauses in this multifarious legislation, must have made the labor of the compiler exceedingly arduous. It appears to have been performed with great fidelity. Those interested in the militia of this and other States, will find that this volume with its full index will readily afford all necessary information; and that not very extensive class of the profession, commissioned and known as judge advocates, will have their labors. upon court martials, should they be so ordered, materially aided by this volume. The volume also contains the general orders, and rules and regulations, for the government of the militia of the State, and the opinions of the attorney-general upon some doubtful questions of construction of some sections of the laws.

Handbuch der Parlamentarischen Praxis, oder Regeln über die Verfahrungsweise und Debatte in verathenden Versammlungen, welche in den Vereinigten Staaten von Nordamerika und in England Kraft und Geltung haben. Von Luther S. Cushing, aus dem Englischen übersetzt und mit einem Vorworte begleitet. von Bernard Roelker, Advocat, zu Boston, im State Massachusetts, V. St. von N. A. Hamburg, 1852. Verlag von Robert Kittler. New York: bei Rudolph Garrique, Varklay Strasse Nr. 4. Boston: at Messrs. Little & Brown's, and James Munroe & Cos. 1 Vol. 8vo. pp 100. paper.

As the title indicates, the above volume is the translation into German of Mr. Cushing's excellent and well known Manual of Parliamentary Practice. We are glad to see that English and American intervention with the legislative proceedings of portions of the continent of Europe, is made in so peaceable, proper and legal a form.

New Publications received.

A Treatise of the Criminal Law of the State of New York; and upon the Jurisdiction, Duty, and Authority of Justices of the Peace, and incidentally of the Power and Duty of Sheriffs, Constables, &c. in Criminal Cases. By Oliver Lorenzo Barbour, Counsellor at Law. Second Edition. 1 vol 8vo. pp. 870 Albany: Gould, Banks & Co., 475 Broadway. New York: Banks, Gould & Co., 144 Nassau Street. 1852.

A Compendium of the Law and Practice of Injunctions, and of Interlocutory Orders in the nature of Injunctions. By the Hon. Robert Henley Eden, of Lincoln's Inn, Barrister at Law. With copious Notes and References to the American and English Decisions. Also an Introduction, and an Appendix of Practical Forms By Thomas W. Waterman, Counsellor at Law. Third Edition. In 2 vols 8vo. pp. 1414. New York: Banks, Gould & Co. Albany: Gould, Banks, & Co. 1852.

Third and Final Report on the Experimental School for Teaching and Training Idiotic Children. Also the First Report of the Trustees of the Massachusetts School for Idiotic and Feeble-Minded Youth. Reprinted, with Corrections by the Writer, from House Document No 57. Cambridge: Metcalf & Company. 1852.

A Discourse delivered before the New England Society, in the City of New York. December 22, 1851. By George S. Hillard. 8vo. pp. 31. Published by the Society. New York: George F. Nesbit & Co., Printers. 1852.

Obituary Notice.

Died, in Boston, on Monday, April 26, Benjamin Rand, LL.D., aged 67.

The main incidents in the life of this distinguished lawyer, and the high respect in which he was held by his professional brethren and the court, appear by the proceedings of the Suffolk Bar, and those before the Supreme Court, which we give below.

A meeting of the members of the Suffolk Bar was held at the Social Law Library, April 27th, at a quarter before nine, A. M., on account of the death of Benjamin Rand, Esq.

The meeting was called to order by Charles G. Loring, Esq., whereupon H. H. Fuller, Esq. was chosen chairman, and George Bemis, Esq. secretary.

Appropriate remarks were made by Mr. Fuller on taking the chair, and also by E. H. Derby, Esq.

The following resolutions were offered by George S. Hillard, Esq.

Resolved, That the members of the Suffolk Bar have heard with sorrow of the death of their late friend and associate, Benjamin Rand, Esq.

Resolved, That the professional life of Mr Rand, crowned, as it was, with the most various and affluent learning, dignified by a stern sense of honor, and marked by a single-hearted devotion to the interests of his clients, and by an unselfish love of the law, for its own sake, more than for its honors or its emoluments — a life passed in modest tranquillity amid the unambitious toils of the bar, and in the calm atmosphere of legal studies — commends itself to the grateful and honoring remembrance of his brethren, and presents a model for imitation to all who survive him.

Resolved, That the massive and copious learning of Mr. Rand, wherein he had no superiors and few equals, was less to be commended than the manly and moral worth which waited upon his daily professional life, than that love of truth, that intolerant scorn of meanness, and that generous disdain of unfair advantages and opportunities, which were leading traits in his character, sometimes expressed more fervidly and uncompromisingly than a cold self-interest would prompt. We delight to honor the memory of the lawyer who, armed with all the weapons and resources of the law, used and valued them only as instruments to secure justice and protect the right, who contended for truth and not for victory, and who would have disdained a triumph bought at the price of self-respect. If the movements of Mr. Rand's mind sometimes showed the effects of a too exclusive devotion to legal studies, his moral sense passed unharmed through all the temptations which our profession presents. His studies never hardened his heart, and his practice never warped his perceptions of right and wrong. His daily life shone with the light of truth, honor, courage and disinterestedness. We feel a melancholy satisfaction in thus expressing and recording our sense of the excellence of Mr. Rand's personal and professional character, and we gratefully and affectionately cherish his memory.

Resolved, That these resolutions be presented to the Supreme Judicial Court now in session, with a request that they be entered upon the records.

Resolved, That the secretary be requested to transmit a copy of these resolutions, and of the proceedings of this meeting, to the family of the deceased, as an expression of the sympathy of the bar in the great loss which they have sustained.

The chairman of the meeting was requested to present the above resolutions to the Supreme Court, upon its coming in on the next day.

Upon the coming in of the Supreme Court on Wednesday morning, April 28th, Mr. Justice Bigelow, presiding, H. H. Fuller, Esq. addressed the Court as follows: —

May it please your Honor: — It has become my melancholy duty, in obedience to the request of my brethren of the Suffolk Bar, to announce to this court, the decease of our brother, Benjamin Rand, Esquire, one of the counsellors of this court. A great man has fallen in our midst; — a mighty spirit has taken its flight from this earthly sphere, and winged its way to heavenly mansions, to join that company of kindred intellects, whose works and thoughts were his study and delight, while he remained amongst us.

Mr. Rand died at his residence in this city, surrounded by his family and friends, early on Monday morning last, of a disease which had confined him to his home for some weeks. He was a native of Weston, in our neighboring county of

Middlesex, where he was born on the 18th of April, in the year 1785. After the usual academical preparation, at Andover, he entered Harvard University, and was graduated at that institution in the year 1808. At the close of his collegiate course, having striven generously and manfully with the master spirits of his class for literary pre-eminence, he was found standing foremost in the front rank.

After leaving the University, he commenced the study of the law, in the office and under the charge of Isaac Fiske, Esq., a distinguished counsellor in his native town; — and afterwards, he completed his professional studies in this city, in the office of our late judge, the Honorable Artemas Ward, and was admitted to practice in the courts of this county. He immediately opened his office here, and continued in the practice of his profession until the close of his life.

During the early part of his professional life, — the first eight or ten years of it, — Mr. Rand had very little encouragement in his profession. The earnings of his labors, in that period, were not sufficient to give him a comfortable support. Being a man of modest and somewhat diffident manners, and a stranger in our city, he labored under many disadvantages, in the acquisition of clients and business, which were only overcome after years of toil and struggle.

But this period of inactivity in his profession was not lost or wasted by Mr. Rand. Indeed, upon looking back to that state of things, which was painful and disheartening in the highest degree, and most grievous to be borne, at the time, we can now see plainly, that in it and by it, he was led to that course of occupation and study, which laid the foundation of his future distinction and professional eminence. During those weary years of melancholy waiting, he not only devoted himself to the most thorough study of his profession, properly so called, the common, civil, maritime, and ecclesiastical law reading all writers, common or rare, upon those subjects, tracing the streams to their fountains in the remotest antiquity of the science; but he plunged into other branches of learning with an enthusiasm and avidity, which seemed to outside lookers on as truly amazing. He made himself thorough master of most of the living languages of Europe, except those of the Czar and the Sultan, so that he could readily read the best authors, and profit by the best thoughts of the great minds who had used those languages. He seemed to have brought home to his soul, with practical effect, the charming maxim of his great Roman exemplar, "*Omnes artes, quæ ad humanitatem pertinent, habent quoddam commune vinculum, quo inter se continentur;*" and he took it in its most literal and liberal interpretation. During this period he pursued the study of medicine, acquiring a vast amount of learning in that science; he dipped into those wonderful discoveries of Egyptian Antiquities, then just beginning to attract public notice, through the labors of Doctor Young, of England, and of the two Champollions, Le Jeune and Figeac, of France; and studied geology, mineralogy, (sciences then new amongst us,) and engaged in many other branches of learning. Most of these studies proved of wonderful use to him in after life, at a time when his professional labors allowed him no time to acquire them for the occasion.

But the period of these luxurious revellings in the fields of learning, unlimited and unrestrained by professional necessities, drew towards a close. It was the fortune, at that time, of Mr. Rand to be retained in a suit, involving all the intricacies and niceties of special pleading, in relation to the breach of covenants under seal. It related to a contract for the erection of certain private palaces for some of our merchant princes in this city. The action lasted several years, involving many questions of fact, and more of law, and coming before the whole court several times upon those questions. For this warfare, Mr. Rand was already armed and equipped, and possessed the consciousness that he was clad in fresh armor, and that he had at his command all that the books could furnish. It is sufficient to say, that before this controversy was fully ended, and all questions therein were settled, Mr. Rand found himself amongst the foremost in the highest ranks of his profession, not only in the estimation of his legal brethren, but of the public generally.

From that time he was rendered happy and placed at ease, both in pecuniary, and in all other senses. During the remainder of his life, his professional engagements and labors were incessant, and the rewards of them were entirely satisfactory to himself and to his friends.

From that time, also, his true character as a man was freely developed, without fear or restraint. Early imbued with an ardent love of learning, he now could gratify his tastes in this respect, by the purchase of the best works, and by drinking at the purest fountains.

But in the midst of this wide world of learning, the natural and the acquired tastes of Mr. Rand led him to the law, not merely as a business or employment, but as an intellectual exercise and discipline; he loved its philosophical precision and exactness and its logical results, partaking so much of mathematical demonstra-

tion and certainty. He may truly be said to have loved the law, and he wooed and won, with the genuine fire of that passion. Indeed, looking at his professional career, he seems, after an observation of the whole of it, to have practised our noble profession as a mere amateur, and for the pleasures it yielded in its pursuit. The natural rewards or recompense, in a pecuniary view, he did not, and could not, refuse to receive; but he never manifested the least thought or care for them, until all was over, and the client naturally desired to know his pleasure in that regard. Indeed, money or riches never seemed to be in his thoughts; he could truly say, if ever man could, "*Nunquam divitias Deos rogavi, contentus modicis!*" And yet a proper gratification of his tastes, even in his profession, required large resources. When it is considered that he possessed himself of the most valuable and well selected private law library which is known to exist in these United States, the necessity of large professional earnings is obvious.

Our deceased brother was a man of many and varied excellencies of character. Possessed of stupendous learning, in his appropriate profession, so much so, as to have been pronounced by eminent judges and jurists, to have at least as much legal learning as any other living man, — and that more accessible for ready use, — besides his acquirements in other branches of learning; yet he bore himself, at all times, with the unaffected simplicity and ingenuousness of early youth. It hardly seemed possible, with such manners, that he should ever have been the close and laborious applicant to study, so necessary for such vast accumulations of knowledge. He was remarkable for a noble generosity and ready sympathy, which opened his heart freely and promptly to every fellow creature. This learning seemed so natural, and sat so easily upon him, that he never appeared to consider that any part of it was to be used for lucre or gain. Whenever a professional brother needed aid, in threading the mazes of any legal question, if he approached Mr. Rand, instantly, without a selfish thought or impulse, the fountains of the law were opened freely and cheerfully; and so much pleasure did he take in imparting portions of his vast stores of knowledge, that when a proper opportunity was offered, he would not permit his brother to depart, till he had pointed him to the leading works, and even cited the most pointed cases, applicable to the question in hand. There was no affectation or display in his manner of doing this; the whole resulted from his irresistible impulse to do good, and to give pleasure to his friends and fellow practitioners; and the ease and readiness with which he could do it, and give a clew to all branches of the law, in its most recondite departments, never ceased to surprise and astonish all who knew him.

It was the good fortune of Mr. Rand, some eighteen years ago, to visit England, — the home of our Anglo-Saxon ancestors, and the native land of the common law. His professional reputation had preceded him. He was received with great cordiality, and marked distinction by the bar and the bench. The acquaintance formed by him on that occasion with the leading minds of our profession in that country, was followed by a correspondence between himself and some of those persons, which discloses the high appreciation which they had formed of his talents and learning. This visit was the source of great pleasure and enjoyment to him. The enthusiastic delight with which he described his first visit to that cradle of the common law, Westminster Hall, where that wonderful monument of human learning and acumen has been built up by the judicial dicisions and labors of seven centuries, can never be forgotten by those who have heard his narrative.

But, Sir, our friend has departed. He has left us behind; we are to follow.

> "Omnes eodem cogimur; omnium
> Versatur urna, serius ocius
> Sors exitura."

But let us not say this in tears, or in sadness. Death is the gate of heaven, — it is a station-house on the road of our unavoidable and predestined progress through the ages. It is our best friend and deliverer from a finite and limited existence; from a narrow world, which the genius of our race has already learned to span as with a girdle, and speak around it, in half an hour. It is the only entrance to these boundless mansions above the visible canopy which overshadows us, through which we may enter and unite ourselves with those mighty intellects, those resplendent spirits, whose efforts and thoughts have elaborated and transmitted to us that wonderful fabric of Christian civilization and culture, which has transformed this terrestrial abode from a place of mere animal development and enjoyment, into a school of intellectual and spiritual discipline and progress, and thus made it worthy of immortals.

May it please your Honor: — The members of the Suffolk Bar have unanimously adopted certain resolutions, expressive of their sense of the great worth and distinguished excellence of our deceased friend. They have directed me to request

this Honorable Court, to cause them to be entered at large upon its records, — that they may remain, so long as the principles of that noble science, the common law, so dear to the deceased, shall continue to be the rule of decision, and the protection and bulwark of our rights and liberties, as a memorial of their feelings and sentiments, and a monument, such as winged words may constitute to commemorate the acquirements, the genius, and the virtues of a departed brother.

Thereupon Mr. Justice Bigelow said in substance: —

I regret that some one of my associates is not present on this occasion, who, having been more nearly a cotemporary with Mr. Rand and more familiar with his professional life and character than myself, would be better able to make a fitting response to these resolutions. I have, however, known our deceased brother long and well enough to bear testimony to his exalted worth, and to the great loss which the profession and the public have sustained in his death.

His varied and profound learning, his incorruptible integrity, his honorable ambition, the highest aim of which was to illustrate our jurisprudence and advance and elevate the profession to which his life was devoted, were the great and shining qualities, which won for him univeral respect and admiration, and which render the example of his life so worthy of imitation. To these may be added that beautiful trait of his character, already alluded to by our learned brother, which led him to regard the treasures of learning with which he had stored his mind, not as means to be used to promote selfish ends, but as a common stock in which all were welcome to share. This was shown, not only by his readiness to impart his knowledge in personal intercourse with his brethren, but by the full and learned annotations with which he enriched several elementary treatises, and the early volumes of our own reports.

I can only add, that I most cordially concur in the resolutions of the bar, and in compliance with the request therein contained, shall order them to be entered on the records of the court; and as an additional mark of respect to the memory of the deceased, I shall not proceed with the business of the court, but shall adjourn it to another day.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Ball, Adison W.	Taunton,	March 30,	E. P. Hathaway.
Bean, George L. *et al.*	Boston,	" 18,	Frederic H. Allen.
Bishop, Phinehas	Belchertown,	" 1,	Myron Lawrence.
Blood, Oliver H.	Worcester,	" 19,	Henry Chapin.
Boston Iron Tube Co.	Boston,	" 20,	John M Williams.
Bremner, Charles P.	Lowell,	" 3,	S. P. Adams.
Briggs, Enoch B.	Worcester,	" 20,	Henry Chapin.
Bronson, Rhesa,	Fall River,	" 24,	E. P. Hathaway.
Cady & Whipple,	Adams,	Feb. 26,	Thomas Robinson.
Call, Moses H.	Boston,	March 1,	Frederic H. Allen.
Carter, Joshua B.	Boston,	" 3,	John M. Williams.
Chadwick, John	Fall River,	" 31,	E. P. Hathaway.
Chandler, Ezra C. *et al.*	Taunton,	" 16,	E. P. Hathaway.
Chase, Francis C.	Leominster,	" 19,	Henry Chapin.
Chase, Luther R.	Newburyport,	" 4,	Daniel Saunders, Jr.
Churchill, Thaddeus	Quincy,	" 10,	Francis Hilliard.
Cochran, Lorenzo H. M.	Melrose,	" 19,	Asa F. Lawrence.
Cobb, Henry	Boston,	" 6,	Frederic H. Allen.
Cobb, Timothy *et al.*	Carver,	" 4,	Welcome Young.
Conant, George F.	Brookfield,	" 20,	Henry Chapin.
Cook, Edwin P.	Amherst,	" 3,	Haynes H. Chilson.
Curtis, Josiah	Boston,	" 11,	Frederic H. Allen.
Dam, Anna	Groton,	" 22,	Bradford Russell.
Davis, Prince	Webster,	" 1,	Henry Chapin.
Day, Benjamin	Lowell,	" 26,	S. P. Adams.
Donelson, Samuel	Coleraine,	" 11,	D. W. Alvord.
Dow, David	Andover,	" 9,	Daniel Saunders, Jr.
Eastman, Jos. S.	Boston,	" 22,	John M. Williams.
Edgerly, J. F. *et al.*	Salem,	" 25,	John G. King.
Ellis, Asa C.	New Salem,	" 1,	D W. Alvord.
Faunce, Elisha B.	Charlestown,	" 25,	Asa F. Lawrence.
Ferdinand, Jasper P.	Roxbury,	" 12,	Francis Hilliard.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Fiske, Josiah	Roxbury,	March 26,	Frederic H. Allen.
Foster, Jos. H.	Mansfield,	" 1,	E. P. Hathaway.
French, Volney	Stow,	" 9,	Asa F. Lawrence.
Fuller, Francis A.	Roxbury,	" 6,	Frederic H. Allen.
Garfield, Alvis	Milford,	" 8,	Charles Mason.
Gates, Edward L.	Wendell,	" 8,	D. W. Alvord.
Gibbes, Lucas	Ware,	" 2,	Myron Lawrence.
Gilbert, Peregrine B.	Worcester,	" 16,	Henry Chapin.
Godfrey, George	Taunton,	" 23,	E. P. Hathaway.
Goodall, Harvey L.	Clinton,	" 13,	Charles Mason.
Goodwin, George H.	Fitchburg,	" 11,	Charles Mason.
Green, John A.	Ware,	" 19,	Haynes H. Chilson.
Griswold A. Whiting	Boston,	" 20,	Frederic H. Allen.
Hall, Lyman	Lanesborough,	" 24,	Thomas Robinson.
Hamblett, Joshua	Lowell,	" 19,	S. P. Adams.
Hawes, Samuel	Bridgewater,	" 21,	Welcome Young.
Heywood, Joel M.	Winchendon,	" 16,	Charles Mason.
Heywood, John B.	West Boylston,	" 4,	Henry Chapin.
Hobbs, Horatio D. *et al.*	Salem,	" 16,	John G. King.
Holmes, Jacob	Freetown,	" 6,	E. P. Hathaway.
Howland, George W. *et al.*	Taunton,	" 16,	E. P. Hathaway.
Inman, Fenner M.	Milford,	" 14,	Henry Chapin.
Janvrin, Joseph	Newburyport,	" 11,	Daniel Saunders, Jr.
Kelley, Moses *et al.*	Lowell,	" 30,	S. P. Adams.
Lang, Lowell Y.	Newburyport,	" 31,	Daniel Saunders, Jr.
Locke, Henry *et al.*	Charlestown,	" 18,	Frederic H. Allen.
Ludden, Chester, *et al.*	Conway,	" 24,	D. W. Alvord.
Ludden, Daniel K. *et al.*	Conway,	" 24,	D. W. Alvord.
Marden, Eben W. *et al.*	Salem,	" 16,	John G. King.
Matthews, William	Charlestown,	" 24,	Asa F. Lawrence.
Miller, Daniel	Savoy,	" 16,	Thomas Robinson.
Miller, James	Somerville,	" 1,	Asa F. Lawrence.
Mirick, Gideon H.	Mansfield,	" 1,	E. P. Hathaway.
Newcomb, Samuel N.	Layunfield,	" 19,	John G. King.
Oliver, Charles W.	Worcester,	" 10,	Henry Chapin.
Page, George	Leominster,	" 31,	Charles Mason.
Perkins, Oliver L.	Boston,	" 6,	Frederic H. Allen.
Phillips, George W.	Worcester,	Feb 26,	Henry Chapin.
Pixley, Lewis	Tyringham,	March 19,	J. E. Field
Rand, William	Brookline,	" 24,	John M. Williams.
Porter, George E.	Quincy,	" 11,	Francis Hilliard.
Pray, William W.	Natick,	" 31,	Asa F. Lawrence.
Quincy, Josiah, Jr.	Boston,	" 6,	John M. Williams.
Reed, William N.	Boston,	" 15,	Frederic H. Allen.
Richardson, Jonas K. *et al.*	Leominster,	" 17,	Henry Chapin.
Richardson, Jonathan C.	Amesbury,	" 29,	Daniel Saunders, Jr.
Richardson, Luke C. *et al.*	Leominster,	" 17,	Henry Chapin.
Rider, Benjamin	Wareham,	" 1,	Welcome Young.
Root, Jabez B.	Greenwich,	" 1,	Myron Lawrence.
Sabine, John	Boston,	" 18,	Frederic H. Allen.
Sanders, Charles	Fitchburg,	" 3,	Charles Mason.
Sanford, Horatio G.	Boylston,	" 29,	Henry Chapin.
Sargent, Nelson	Newton,	" 17,	Asa F. Lawrence.
Sargent, William H.	Essex,	" 24,	John G. King.
Seabury, Pardon G.	New Bedford,	" 13,	E. P. Hathaway.
Simmons, James E.	Somerville,	" 4,	Asa F. Lawrence.
Simpson, Reuben	Chelmsford,	" 24,	S. P. Adams.
Smith, John H.	Newburyport,	" 12,	Daniel Saunders, Jr.
Snow, Benjamin B.	Charlestown,	" 26,	Bradford Russell.
Snow, Sabeman	Raynham,	" 16,	E. P. Hathaway.
Spear, Simeon C.	Easton,	" 30,	E. P. Hathaway.
Sweet, Thomas	Marblehead,	" 12,	John G. King.
Taft, Charles O.	Blackstone,	" 4,	Henry Chapin.
Trefeten, J. L. *et al.*	Salem,	" 15,	John G. King.
Trow, Thomas C. *et al.*	Lowell,	" 30,	S. P. Adams.
Turner, Robert R.	Charlestown,	" 8,	Bradford Russell.
Watt, Nathan W.	Medford,	" 13,	Asa F. Lawrence.
Waterhouse, Benj. W.	Lowell,	" 9,	S. P. Adams.
Waterman, John *et al.*	Carver,	" 4,	Welcome Young.
Webster, Charles E.	Reading,	" 11,	Asa F. Lawrence.
Whitcom, Edwin	Adams,	" 27,	Thomas Robinson.
Whiteley, Edward	Boston,	" 25,	Frederic H. Allen.
Williams, Hinkley	Goshen,	" 26,	Haynes H. Chilson.
Winn, Henry C.	Pepperell,	" 16,	Bradford Russell.
Wood, Joseph	Fitchburg,	" 13,	Charles Mason.